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"A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed than in examining the laws and customs of foreign nations."

Samuel Johnson

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NOTE

With this number the Third, or New, series of the JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW comes to an end. The Society is to replace it by a new journal, called the *International and Comparative Law Quarterly* (I.C.L.Q. for short), which will constitute both a Fourth Series of the Journal and a Second Series of the International Law Quarterly. This step has been taken because of the increased costs of publishing and the increased calls upon the purses of subscribers. The new Quarterly will cater, as far as possible, for those who are interested in comparative and foreign law as well as those who are interested in public and private international law. It is thought, however, that quite a large number of persons, especially those whose legal practice or other activities bring them into contact with foreign business or foreign law, are interested in both comparative law and private international law, and that the latter subject cannot be divorced from public international law. This Journal has always been called the Journal of Comparative Legislation and International Law: of recent years the space devoted to international law, whether public or private, has greatly decreased, partly because of the establishment of the International Law Quarterly. The amalgamation of the two journals represents therefore to some extent a return to earlier practice; and the disappearance of some duplication in the reviewing of books on international law will actually increase the space available for articles and notes on comparative and foreign law.

The one casualty is the Review of Legislation. The cost of publishing it had, it was felt, become the chief, and least justifiable, drain on the Society's resources. The Society takes this opportunity of thanking very warmly the many persons whose contributions have made possible the publication of the Review. Not all those contributions have yet been published. It is proposed, unless the contributors object, to use in the first four numbers of the new Quarterly the unpublished material which has already come to hand, together with any material which contributors have ready for dispatch and would like to see published. The contributors are invited to maintain their connection with the Society and to submit notes on any topics relating to their respective territories which they think would be of interest to readers: the Society must inevitably depend very largely for its pages of Notes on unsolicited material sent in from outside.

It is hoped to replace the Review of Legislation in some measure by surveys, appearing at irregular intervals, of the general legal development in different countries. They will in some instances be an expansion, to cover private law, of the Notes on Constitutional Developments in the Commonwealth which have recently appeared in the Journal. Moreover, the time has perhaps come when an attempt should be made to assess the extent to which the laws of the common law parts of the Commonwealth have diverged from that of England. Any help which contributors can give for either of these purposes, in the form of articles or notes, will be welcomed.

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ENEMY LEGISLATION AND JUDGMENTS IN THE LIBERATED COUNTRIES.

LIBERATION LEGISLATION IN MALAYA

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The rights and duties of an occupant within occupied territory are matters of international law, but the question of whether, upon liberation of that territory, measures taken by the occupant are to be avoided or confirmed is a matter for the restored Government and legislature.[1] For the returning sovereign to nullify all legal relations created during the occupation period would be unjust to the individual inhabitants and, as Spaight points out, "impolitic as regards the community at large." In general, the Acts of the occupant possess legal validity, and under international law should not be abrogated by the subsequent government. This rule, however, does not necessarily apply to Acts that exceed the occupant's powers.[2] The principle is sufficiently plain; but in practice the decision of what is, and what is not, in excess of an occupant's powers is sometimes difficult. The Hague Regulations do not always provide adequate means of testing the legality of the measures taken by an enemy occupant during the war of 1939 to 1945. On many aspects of modern belligerent occupation the Hague Regulations are incomplete or controversial. In such circumstances, to leave all questions of the legality of measures taken by an occupant to the Courts of the returning sovereign guided only by incomplete international conventions would cause chaos. Uncertainty can only be excluded or minimized by intervention of the restored legislature.

It is proposed, in this article, to give an account of some of the legislative measures which were taken by the restored legislature of the Malayan Union and its successor, the legislature of the Federation of Malaya, for solving problems arising out of the enemy occupation of that territory.

The first phase consisted of legislation by Military Proclamations. A British Military Administration, which became fully effective on the Japanese surrender, was established by the Supreme Allied Commander, South-East Asia, by virtue of a Proclamation, called the Military Administration Proclamation, signed at Kandy, Ceylon, on August 15, 1945.[3] By that Proclamation the Supreme Allied Commander assumed for himself and his successors "full judicial, legislative, executive and administrative powers and responsibilities and conclusive jurisdiction over all persons and property throughout such areas of Malaya as are at any given time under the control of the Forces under my command." By that Proclamation it was further declared that all laws existing immediately prior to the Japanese occupation would be respected, that rights and properties would be respected subject, however, as regards rights and properties acquired during the Japanese occupation to investigation and to such action as justice required, and that all Proclamations and legislative actions of whatever kind issued by or under the authority of the Japanese Military Administration should cease to have effect. The jurisdiction of courts other than military courts established by the Supreme Allied Commander was suspended.

A series of Military Proclamations followed.

The Military Courts Proclamation dated August 29, 1945,[4] established Military Courts with extensive criminal jurisdiction. It was not at first intended to acquit *uno ictu* all persons convicted before occupation tribunals or to liberate all persons sentenced by such tribunals. It was proposed to examine, in each case, the nature of the offences of which the accused person had been convicted, the

[1] *Wheaton. International Law.* 7th edn., p.245.

[2] *Wheaton. International Law.* 7th edn., p.245, and see *McNair. Legal Effects of War.* 2nd edn., pp. 337, 338.

[3] Malay Peninsula Proclamation. No. 1 *Malay Peninsula Gazette* Notification No. 1, dated November 1, 1945.

[4] *Malay Peninsula Gazette* Notification No. 3, dated November 1, 1945.

validity of the law (if such law had been promulgated during the occupation period) under which the proceedings had been brought, and the procedure of the Japanese tribunal at the trial. To this end the Military Courts Proclamation provided that sentences passed by the Japanese tribunals, and charges pending before them at the time of the surrender, would be subject to review by the British Military authorities, and that no sentence of death imposed by any Japanese tribunal was to be executed unless confirmed by the General Officer Commanding the Military Forces, Malaya. Powers were taken to quash convictions and sentences of death, to grant pardons and to commute death sentences to sentences of imprisonment or of fine. Subsequent investigations, however, revealed that the procedure in Criminal Courts operating during the occupation and the actions of the Japanese police had been so foreign to British ideas of justice that it was impossible to permit them to stand. Accordingly, all convictions during the occupation period by Japanese tribunals were quashed.[5]

The question of whether or not judgments and decrees of civil Courts set up by the Occupying Power (referred to in this article as Japanese decrees or Japanese judgments) should be recognized as valid was not dealt with by the Military Administration but formed the subject of the Japanese Judgments and Civil Proceedings Ordinance, 1946, of the Malayan Union, enacted after the restoration of civil government. That Ordinance has its counterpart in Singapore. On the one hand, it was not desired to upset wholly executed decrees of occupation courts unless they were the result of some grave miscarriage of justice: on the other, it was felt that to have to rely upon a Japanese decree or grant where that decree or grant still required to be operated would be repugnant to a number of people, and might, for certain purposes, be useless. For instance, difficulty might be encountered in getting a Japanese grant of probate accepted by banks and authorities outside Malaya, even if it were considered valid in Malaya. The principle upon which the Ordinance proceeded was this: Persons aggrieved by a Japanese decree might apply to the appropriate Court to have the decree set aside either wholly or in part, or might apply for leave to appeal against it, and the appropriate Court was empowered to make any necessary order. A schedule to the Ordinance showed which was the appropriate Court. On the other hand, persons in whose favour a Japanese decree had been made were allowed to apply, within the time specified in the Ordinance, for a decree of the appropriate Court to be substituted for the Japanese decree. No party to a Japanese decree was obliged to apply for either relief, and, if he did not, the results of the Japanesee decree were to stand, unless affected by other legislation such as the Debtor and Creditor legislation or the Titles to Land (Occupation Period) legislation mentioned below.

The grounds on which a Japanese decree might be set aside were laid down in the Ordinance and are as follows:—

> " (*a*) that it was obtained as a result of such force, injury or detriment to any party to the proceedings or other person, or such threat thereof, as, in the opinion of the appropriate court, was sufficient to render the action of the party in relation to the proceedings involuntary;
>
> (*b*) that any necessary party did not appear personally, but was represented by any person appointed by any Japanese authority; or
>
> (*c*) that it was based on principles unknown to the laws as they existed immediately prior to the Japanese occupation."

The Ordinance also provided that a Japanese decree might be set aside on any other ground, not specifically mentioned above, which the appropriate Court considered to be sufficient. This has been held to cover a case where a settlement was imposed by a Japanese judge upon the parties in the absence of their Counsel.[6] No decree may, however, be set aside under the Ordinance solely

[5] Convictions by Japanese Tribunals Proclamation dated November 10, 1945. *Malay Peninsula Gazette* Notification No. 43, dated November 14, 1945.

[6] *Chong Fong Shen v. Chan Phooi Hong* (1947), 13. *Malayan Law Journal*, 104.

on the ground that the person or persons constituting the Japanese court whose decree is in question, was not or were not appointed in accordance with the provisions of, or did not possess the qualifications specified in, the laws in force immediately before the Japanese occupation.

One of the many urgent problems which faced the civil government on its resumption was the question of the reinstatement of leases and tenancies of business and domestic premises in urban areas. Many such premises had, perforce, been vacated by lessees and tenants who had become prisoners of war, internees or refugees, or had been dispossessed by the advancing enemy or by the Japanese during the occupation. The Japanese had dispossessed a great number of people, in some cases installing their own favourites. In conditions of acute housing shortage, returning prisoners of war, internees and other dispossessed persons, not unnaturally, pressed to recover possession of their former premises and to continue their lease or tenancy agreements. Clearly also they ought not, in justice, to be allowed to remain liable for arrears of rent or for breaches of lessees' covenants during a period of dispossession for which they were not responsible. The doctrine of frustration, as applied to commercial contracts, does not apply to leases,[7] so that legislation was necessary. The rights of landlords (both dispossessed persons and others) had also to be considered.

These problems were dealt with by two Ordinances intituled respectively the Leases and Tenancies (War Absentees) Adjustment Ordinance, 1946, and the Leases and Tenancies (Dispossessed Persons) Ordinance, 1946.[8] The provisions of these Ordinances are too long to be noticed in detail, but their main principles were as follows:—

Leases and Tenancies Adjustment Boards were set up in urban areas. In cases where a lessee or tenant under a lease or tenancy granted prior to February 15, 1942 (called a " pre-occupation lessee " or " pre-occupation tenant ") became a war absentee (as defined) and the lessor or landlord did not become a war absentee, and where the term of the lease was unexpired at the commencement of the Ordinance, the pre-occupation lessee was given an option, exercisable within a specified period, to continue or to discontinue the lease. If the lessees did not elect to continue it, the lease was to be deemed to have been cancelled as at the date when the lessee relinquished possession owing to war circumstances, and payment of rent and performance of covenants was excused after that date. If the pre-occupation lessee elected to continue the lease, payment of rent and performance of covenants under it were excused from the date of relinquishment of possession until the date when, after the exercise of his election, vacant possession became again available to the pre-occupation lessee. Any new lessee or new tenant must vacate the premises in favour of the pre-occupation lessee, on receipt of compensation for any permanent improvements made by him and of such compensation for ejectment as might be awarded by the Board not exceeding the amount of one month's rent under the pre-occupation lease. There were provisions dealing with incidental matters and with recovery of possession of the premises and of landlord's and tenant's fixtures, and furniture and fittings left thereon. Other clauses dealt with expired leases, and leases and tenancies where the landlord became a prisoner of war, internee or refugee, and with the rights of third parties and of persons holding under orders of the Japanese Custodian of Property.

Freehold titles remained to be adjusted. Because of the various systems of land tenure prevailing in Malaya it was necessary to enact three Ordinances, namely, the Titles to Land (Occupation Period) Ordinance, 1949, the Dealings in Land (Occupation Period) Ordinance, 1949, and the Dealings in Land (Malacca Customary Lands) (Occupation Period) Ordinance, 1949,[9]

[7] *Cricklewood Property & Investment Trust and Leighton's Investment Trust Ltd.* (1945), 61 T.L.R., 204.

[8] Malayan Union Ordinances, Nos. 18 and 22 of 1946.

[9] Federation of Malaya Ordinances Nos. 39, 40 and 41 of 1949, published in Federation of Malaya Gazette Notifications Nos. 3251, 3252 and 3253 dated 28th September, 1949.

which deal, respectively, with land in the Malay States, land in the Settlements of Penang and Malacca and customary land in the Settlement of Malacca. The three Ordinances necessarily differ in detail but the policy adopted in all three is the same. For the purposes of this article reference will be made to the provisions of the Titles to Land (Occupation Period) Ordinance, 1949. The object of this Ordinance was to enact a comprehensive measure which would lay down the principles upon which transactions in land effected during the occupation period could be settled and which would enable the proper officer to rectify the register of titles to land in all cases where dealings took place during the occupation period which were not in accordance with pre-occupation law or with accepted principles of international law.

This Ordinance and the corresponding Ordinances dealing with land in the Settlements proceed upon the following two main principles—

(1) transactions in land, other than public land, effected during the occupation period are not to be invalid by reason only that they took place during the occupation period; and

(2) grants of public land made by the occupant are void, but may in certain cases be confirmed.

Section 3 of the Titles to Land (Occupation Period) Ordinance, 1949, declares that, save as otherwise provided in the Ordinance, no registered dealing regularly effected during the occupation period shall be invalid by reason of its having been effected during that period, if the instrument by which such dealing was effected was executed by the person entitled by pre-occupation law to execute it or by his agent, and if its registration was in accordance with the pre-occupation law governing the registration of such instrument. Such registered dealing is to be valid, notwithstanding certain specified irregularities not affecting the substance of the transaction, as, for example, want of due form in attestation, or failure to stamp the instrument in accordance with pre-occupation law (Section 4).

Section 7 renders void alienations of State land effected by the occupying power during the occupation period. But, if an approved application or a document of title evidencing an alienation during the occupation period is signed by the proper authority, and is in the form appropriate to the alienation, such alienation may be confirmed subject to such further conditions and such revised rent or premium as may be required.

Lands which the occupying power purported to acquire compulsorily during the occupation period are dealt with by Section 12. Where such lands are required to be retained by Government, particulars are to be published in the *Gazette,* and such lands are then to be deemed to be lands required for a public purpose under the law relating to land acquisition and must be dealt with accordingly. Provision is made for the payment of compensation to owners, where none was paid by the occupying power, or of additional compensation where too little was paid. The machinery for assessing compensation is to be that provided in the law relating to land acquisition, and credit will be taken for sums already paid by the occupying power revalued in accordance with the provisions of the Debtor and Creditor (Occupation Period) Ordinance, 1948, mention of which is made below. Other provisions of the Ordinance deal with the procedure for effecting the rectification of registered titles to land which becomes necessary as a result of the provisions set out above. The title of a registered proprietor, chargee or lessee under an instrument executed during the occupation period is declared not to be indefeasible if such execution was procured by coercion or duress (as defined) to which such proprietor, chargee or lessee is proved to have been a party. Each of these three Ordinances must be considered together with the Debtor and Creditor (Occupation Period) Ordinance, 1948, mentioned below.

A serious problem which had to be faced after the surrender of the Japanese was that arising out of the measures which had been taken by them in connection with currency. The currency in use in Malaya before the occupation was

left in circulation by the Japanese; but they also introduced a new currency which they issued without coverage, without a proper record of the quantities of notes issued, and without taking adequate measures for the prevention of extreme inflation. In introducing a currency without these necessary precautions, it is submitted, they exceeded the powers normally conceded to an occupant by international law. The first step taken by the British Military Administration in connection with currency was to declare by Military Proclamation dated August 29, 1945,[10] that no currency should be legal tender other than currency issued by the authorities, and under the laws, in force in Malaya before the occupation. Proclamation No. 5[11] of the same date established a general moratorium in respect of all debts incurred and all bills of exchange becoming due for payment before the date of that Proclamation. During the period of the moratorium, all debts and the due dates of all bills of exchange affected thereby were suspended and extended for that period. In computing any period of limitation, the period of the moratorium was to be excluded. No interest was to run during the period of the moratorium in respect of any debt or bill of exchange affected thereby. No rights, remedies or powers in respect of any debt or bill of exchange affected by the moratorium were to be exercised or enforced solely by reason of non-payment as a result of the provisions of the Moratorium Proclamation; but nothing contained in that Proclamation was to prevent the voluntary payment of any debt. The moratorium was declared not to apply to any debt—

(*a*) incurred after the date when the Proclamation took effect;
(*b*) not exceeding fifty dollars in respect of any one transaction;
(*c*) due in respect of (i) wages or salaries, (ii) professional services, (iii) work and labour, (iv) rent not exceeding one year's rent; or
(*d*) due to any Government or Local Authority.

The moratorium, originally intended to last for a few months, remained in force for four years. It was lifted on the 1st October, 1949, by virtue of the Moratorium Proclamation (Repeal) Ordinance, 1949. In view of the delay in lifting the moratorium and of conflicting opinions as to the interpretation of the provision of the Proclamation laying down that no interest was to run during the period of the moratorium, that Ordinance provided that interest in respect of the period between the 1st day of April, 1946, and the 1st day of October, 1949, was to run at the rate which would have been payable if the provisions of the Moratorium Proclamation had not been in force or at the rate of four and one-half per centum simple interest, whichever was the lesser. By the Limitation (Enemy Occupation) Ordinance, 1946,[12] of the Malayan Union, a period beginning on January 1, 1942, and ending with the lifting of the moratorium was required to be excluded from the computation of all periods of limitation.

As has been mentioned, the first measures taken by the British Military Administration with regard to currency were to establish pre-occupation Malayan currency as the sole legal tender and to declare a moratorium. The position having been thus secured, difficult decisions of policy had to be taken regarding the relation of debtors and creditors generally, and, in particular, regarding debts incurred or discharged in occupation currency during the occupation period and the position arising from the liquidations, which had been effected by the occupying power, of banks other than Japanese or Chinese banks.

For an understanding of some of the problems requiring solution, a word must here be said as to the course of events during the occupation period which had particularly affected debtor-creditor relations. The first important circumstance was the variation which had occurred during the occupation period

[10] The Currency Proclamation. *Malay Peninsula Gazette* Notification No. 4, dated November 1, 1945.

[11] The Moratorium Proclamation. *Malay Peninsula Gazette* Notification No. 4, dated November 1, 1945.

[12] Malayan Union Ordinance No. 4 of 1946.

in the real value of occupation currency and in the rate of exchange between pre-occupation currency (which, as already stated, the Japanese had allowed to continue in circulation) and the occupation currency introduced by them. During the first year of the occupation, the pre-occupation dollar and the occupation dollar were of roughly equivalent value: thereafter the occupation dollar declined in value, at first gradually and later sharply. By the beginning of 1945, the unrestricted issue by the occupying power of paper dollars without proper cover and the military misfortunes of the Japanese had started a runaway inflation. By the 12th August, 1945, when the British re-occupation took place, occupation currency had become almost worthless. A second circumstance which considerably affected debtors and creditors was the action of the occupying power in relation to " foreign " banks, that is to say banks other than Japanese or Chinese banks, and in relation to the bank accounts of " foreign " depositors. Liquidation officers of " foreign " banks and a Custodian of the property of " foreigners " had been appointed: debts due to " foreign " banks and " foreigners " had been called in and, in certain cases, the amounts realized had been credited to accounts of the corporations or individuals concerned which had been opened for the purpose in a Japanese bank.

In these circumstances, the following were some of the problems which arose for solution by the returning Government:

(*a*) whether, having regard to the depreciation of occupation currency, a repayment, made during the occupation period, of a debt incurred prior to the occupation, should, or should not, be a good discharge of the debt;

(*b*) whether a debt incurred during the occupation period in occupation currency and still outstanding should, or should not, be repayable in Malayan currency, and, if repayable, whether it should be repaid at face value or at a re-valuation;

(*c*) whether pre-occupation debts paid, by direction of the occupying power, to the Japanese liquidators of " foreign " banks should, or should not, be considered to have been discharged, having regard to the depreciation in occupation currency and to the fact that the Japanese liquidators had not been constituted by these Banks as their agents to collect such debts;

(*d*) whether transfers, by direction of the occupying power, to a Japanese bank of the pre-occupation credits of the customers of " foreign " banks should, or should not, discharge the " foreign " banks from their obligations to such customers;

(*e*) whether, if it should be decided to reinstate any debt purporting to have been discharged in occupation currency, any mortgage or other security securing such debt should also be reinstated; and, if so, how any intervening rights of third parties in the mortgaged property should be adjusted;

(*f*) whether interest on debts should, or should not, be payable during the occupation period, having regard particularly to the fact that many debtors had been separated from their creditors by the " line of war ".

Answers to these, and other, questions, were contained in a Report of Select Committees of the Legislatures of the Federation of Malaya and Singapore, sitting jointly, and were subsequently, after minor changes, enacted in the Debtor and Creditor (Occupation Period) Ordinance, 1948.

By that Ordinance a pre-occupation debt was defined as a debt payable by virtue of an obligation incurred prior to the commencement of the occupation period and accruing due at any time. Section 3 of the Ordinance provided that, subject to the provisions of section 7, a pre-occupation debt which still remained wholly unpaid at the commencement of the Ordinance should be payable in full with interest calculated as mentioned below.

Section 4 of the Ordinance dealt with the discharge, during the occupation period, of pre-occupation debts and provided that where any payment was made during the occupation period in respect of a pre-occupation debt, such payment was to be a valid discharge of such debt to the extent of the face value of the payment. To this principle, however, important exceptions were provided. The first was where the acceptance of payment of the pre-occupation debt in occupation currency had been obtained by duress or coercion (as defined). In such a case the re-payment of the debt was not to be taken at face value, but at a re-valuation to be fixed in accordance with a scale set out in a Schedule to the Ordinance, and was only to be taken as a discharge of the debt *pro tanto*. Under other exceptions the same procedure was applied to payments made in occupation currency to a Japanese Custodian or liquidation officer of a " foreign " bank in respect of pre-occupation capital debts exceeding two hundred and fifty dollars in amount, and to all payments made in occupation currency in respect of pre-occupation debts exceeding two hundred and fifty dollars in amount which—

(i) were made after the date when the occupation dollar began to decline in value and were not due at the time of the payment; or

(ii) if due, were not demanded by the creditor or his agent on his behalf; or were not payable within the occupation period under a contract of which time was of the essence; or

(iii) if due and demanded, were not paid within three months of demand or within such extended period as was mutually agreed between creditor and debtor.

The principle underlying these provisions is that the settlement in occupation currency of pre-occupation debts which fell due in the ordinary course of business or took place before the decline in value of occupation currency should not be upset, but that creditors who voluntarily settled pre-occupation debts in occupation currency for the purpose of taking advantage of a depreciated currency should only benefit to the extent of the real value of the amounts which they paid. A " pre-occupation capital debt " was defined as any pre-occupation debt other than a sum accruing due after the commencement of the occupation period in respect of rent or interest.

Section 5 of the Ordinance gave their face value to payments made during the occupation period in respect of obligations incurred during that period.

Section 6 dealt with occupation debts still outstanding at the commencement of the Ordinance and provided for such debts, unless they were expressly made payable in occupation currency, to be re-valued in accordance with the provisions of the section and the scheduled scale, and for the re-valued amount, if in excess of one hundred dollars, to be repayable without interest.

Sections 7 and 8 of the Ordinance contained various provisions regarding bank accounts, of which the most important are the provisions of section 7(2) to the effect that payment by a bank to a Custodian or liquidation officer of any pre-occupation credit balance or part thereof of a customer was not to be deemed to be a payment to the customer for purposes of the Ordinance, and of section 7(3) the meaning of which appears to be that where, during the occupation period, the whole or a percentage of the pre-occupation balance of the account of any person with a bank was credited to the account of that person with a Japanese bank at the instance of the occupying power or of the Custodian or a liquidation officer and the account of such person with the first-mentioned bank was debited accordingly, such debit was not to be deemed a payment to the customer if he could prove that he did not draw the whole or any portion of the amount credited to him, or that he obtained no benefit from the credit, and if he did draw against the credit or obtain a benefit therefrom, then the debit was only to be deemed a payment to him to the extent of the face value of the amount drawn, or to the extent that he obtained a benefit.

The question of whether interest on pre-occupation debts should run during the occupation period was dealt with by section 10. In brief, that section pro-

vided that interest on pre-occupation debts remaining unpaid at the commencement of the Ordinance was to be payable at the rate provided by agreement, statute or otherwise (called " the due rate ") or at 3 per cent. simple interest, whichever rate was less, with provisoes allowing a creditor or debtor who could show cause for an increased or decreased rate to obtain an order of the Court allowing this.

Section 11 dealt with the reinstatement of securities and provided, *inter alia,* that where a debt purporting to have been discharged in occupation currency was wholly or partly reinstated under the provisions of the Ordinance, any charge (which includes mortgage) securing the debt was also to be reinstated. This provision was made subject to exceptions in favour of *bona fide* third parties who had become purchasers or chargees for value of the property subsequently to the purported discharge of the charge which had secured the debt.

An important departure from the general principles of international law is made by the Debtor or Creditor (Occupation Period) Ordinance, 1948, on the question of agency. Subject to certain qualifications, the Ordinance provides that an agency will not be deemed to have terminated where the agent continued to act for his former principal during the occupation period while his former principal was absent from Japanese or Japanese occupied territory. This provision conflicts with the ordinary rule that contracts of agency are terminated by the separation of the principal and the agent by the " line of war ". It was inserted to obviate the manifest injustice to debtors which would occur if absent principals or principals under restraint were to be at liberty to repudiate, for this reason, the acts of their agents who continued to act for them in Malaya during the occupation period. To permit such repudiation would mean that persons who had, throughout the occupation, continued to pay, in good faith, rent, or interest, or to discharge other debts to the former agents of absent principals who continued to hold themselves out as having authority to receive those payments, would have to pay over again. The decision may bear hardly upon a comparatively small number of absent principals or principals under restraint whose agents failed to account to them satisfactorily; but the principal was originally responsible for the choice of his agent, and it was thought that, in this conflict of equities, the balance was heavily on the side of the debtors. This legislation has its counterpart in the Colony of Singapore and in Hongkong.

Other problems arising during the occupation period from the relationship of principal and agent are the subject of an Ordinance entitled The Agents and Trustees (Occupation Period) Ordinance, 1949.[14]

This concludes the brief review of post-occupation legislation possible within the scope of this article. With the above-mentioned exceptions, transactions involving legal obligations effected during the occupation period, such, for instance, as contracts of sale, hire, employment, partnership, have not been upset, and distributions of the estates of deceased persons under probates and letters of administration granted during the occupation period remain good, subject to the provisions of the Japanese Judgments and Civil Proceedings Ordinance already mentioned.

CASE LAW AND CODIFIED SYSTEMS OF PRIVATE LAW[1]

[*Contributed by* PROFESSOR E. M. MEIJERS.]

As the subject of this lecture I have chosen a comparison of the type of private law where the law must be found in a common law formed from case law with the continental type where the basis of civil law is formed by codification.

I suppose you know all about case law, but I should like to give you some details about codification.

[14] Federation of Malaya Ordinance No. 38 of 1949.

[1] This is a slightly modified version of a public lecture delivered before the University of Oxford on 16th May, 1951.

A codification is a form of statute law which does not regulate a specific subject incidentally, but regulates systematically and comprehensively a major part of the law such as private law or penal law.

The great movement on the Continent towards codification started in the eighteenth century and has continued in the nineteenth and twentieth centuries.

Before I explain the factors that have favoured the formation of codes in modern times, it might be advisable to warn you against certain misconceptions.

Firstly, you should not believe that if a codification exists, it is the only source of law. The continent of Europe also has customary law and there are always many cases not governed by the codes. There are still some lawyers, even on the Continent, who believe that the task of a judge when applying a codified system consists only in being the spokesman of the legislator, with the consequence that a judge need only know and apply the various sections of the general code, and nothing else. I will give you an example of that opinion.

It is a rule of the Dutch commercial code that the owner of a ship is responsible for the acts of the pilot, and another rule says that an employer is responsible for the acts of a person who is in his service. Further, no ship may enter the port of Rotterdam if it is not piloted by a pilot in the service of the town of Rotterdam. Now a ship entered the port of Rotterdam, the captain asked for and got a pilot. The pilot ordered him to anchor at a forbidden spot where the ship damaged a cable owned by the city of Rotterdam itself. The city of Rotterdam sued the owner of the ship, alleging negligence on the part of the pilot. The judge was indignant, because the pilot was in the service of the plaintiff and had been ordered by the plaintiff to pilot defendant's ship into the port. The judge said: instead of suing the shipowner the plaintiff would have done better if he had searched his own heart and therefore he gave judgment for the defendant. On appeal, the plaintiff argued that there is no article in the Dutch code obliging a plaintiff to search his own heart. We encounter here the idea that there is no law beyond the code. The result of the appeal was, of course, negative. In the High Court, too, judgment was given for the defendant.

To-day it is generally admitted that a great part of the law is not found in codes; Dutch private international law for instance cannot be found in the code, but is found in general principles and decided cases.

A second misconception is that a continental lawyer has only to know abstract rules and the art of applying them. Common sense is of the same importance in all countries where a judge administers justice. I will give you an illustration. A merchant before going abroad asked a friend to keep for him for a fortnight two barrels of wine. On his return he visited his friend and asked him to return the two barrels. At the moment he received them he noticed by the sound that one of the two barrels was only half full. " I gave you two barrels full of wine," he said; " I have returned the barrels just as I got them," was the answer. A lawsuit was the consequence. Counsel for the two parties quoted all the rules and all the leading cases relating to the burden of proof. It was asserted for the plaintiff that if the depositary did not protest at the time, it is to be presumed that he got the barrels full; for the defendant that if the depositor alleges negligence on the part of the depositary he must prove that negligence. What was the decision of the judge? Only: " Bring the barrels into Court "; after that he asked the plaintiff: " Was the wine in the two barrels of the same vintage?" " Yes," was the answer, " the wine was three years old." " Then open the barrels," said the judge. He took a dipstick and dropped it into the two barrels in succession. Then all he said was: " I give judgment for the defendant; the lees in the one barrel are exactly half as deep as in the other barrel; that would be impossible, if the barrels had both been quite full and one of them after three years had been half emptied."

Another misconception about codification is that it makes the law too rigid; case law can be modified as the needs of society change; if statute law is to be changed, a new statute is necessary, a thing always difficult to effect.

I believe there is some exaggeration in both points of view. On the Continent the interpretation of statute law is not so rigid as it is in England; the judge takes more account of the principle behind the statute than of the strict sense of its words. That has had the consequence that the meaning of a statute law changes with the needs of society.

May I give you an example: a prohibition against walking on certain land was applied to a person who cycled on that land; one judgment is extant in which the judge decided that cycling is a complicated mode of walking, but other judges have said that a rule given for walking was also applicable to cycling, because the same motive existed for the prohibition of the one act as for the prohibition of the other.

A second example: a municipality enacted an ordinance making it an offence to take a seat within its jurisdiction on a cart drawn by dogs. A milkman living in a neighbouring village always passed through the town sitting on a cart drawn by a dog. A warrant having been issued against him, his defence was: I did not *take* a seat on the cart in that municipality; I was already sitting on the cart when I crossed the boundary and only taking a seat is prohibited, whereas sitting on the cart is not mentioned. Grammatically he was right, but nevertheless he was fined by the judge; it was sufficient that the *ratio decidendi* in both cases was the same. The *ratio decidendi* is decisive not only for the interpretation of a precedent but also for the interpretation of a statute.

The meaning of a statute changes not only as a consequence of the progress of science but also as a result of a change in the valuation of human interests. The present Dutch civil code dates from the beginning of the nineteenth century. In those days one's wife and children were regarded according to the ideas of the ancient rural class: your children were members of your family; your wife always remained an outsider. The consequence of this was, that in the order of succession husband and wife were placed below the relatives in the twelfth degree, that is to say, below relatives whom nobody knows. Ideas about the relationship between husband and wife have changed fundamentally since then: a statute of 1923 placed husband and wife in the order of succession on the same line as children. But not only have the statutes changed the law on that point, the judge of to-day confers rights of succession upon husband and wife that he withholds from children. The introduction of those rights is facilitated because the Dutch judge can recognise that moral obligations sometimes have legal consequences and the judge of to-day recognises moral obligations quite different from those admitted by his predecessors of a hundred years ago.

The same observation can be reiterated for the law of contracts and torts. In the law of contracts both parties must do what is required by good faith, in the law of torts everything that is done contrary to one's duty of care towards another's person or property is a tort.

You see, instead of saying: the system of a codification is too rigid, one can say with equal reason: the modern conception of a codification gives too much freedom to the judge.

One must not forget on the other hand that abstract and rigid principles are not unknown in a system of case law: that a consideration must move from the promisee and that a moral obligation is not a consideration, are general rules that an English judge must apply even if he finds their application inequitable. One should never forget that general rules are necessary for the certainty of law. How much of the law must be contained in general and abstract rules and how much may depend on the particular circumstances of the case, cannot be stated in general terms. But that difficulty is the same in case law as in a codified system.

A fourth misconception is connected with the value of judgments as precedents. It has often been said that a nation ruled by case law would attach greater value to the decision of a judge than a nation whose law is codified. It is true that on that point a great difference existed in the first half of the nine-

teenth century, just after the codes had been enacted. In *Bremer v. Freeman*[2] a French lawyer declared as a witness that in France judicial precedents had a comparatively insignificant effect upon subsequent cases, and on being asked by the perplexed English lawyer: "What are your judicial decisions then good for"? received the concise and remarkable answer: "They are only good for those who get them."

Sir Robert Phillimore, after mentioning that examination of the French expert, adds this remark: "Never were the opposite characteristics of the legal mind of the two countries more clearly shown, and, perhaps, it might be added, the defects of both: the obstacle to the melioration of law presented by the inflexible adherence to a judicial precedent on the one hand; and on the other, the great uncertainty of law arising from the disregard of judicial precedent."[3]

Since *Bremer v. Freeman* much has changed on the Continent. An inferior judge, it is true, is not bound by the decisions of a higher Court and we have cases in which the inferior judge continues to follow his own opinion of the law against the decisions of the High Court. But what is the consequence when the opinion of that Court is firmly established? The party against whom judgment is given appeals and the dissident judgment is reversed. In Rotterdam we had a judge who would not grant a divorce in a type of case in which the High Court admitted it. The Court of Appeal had for such cases printed judgments, on which the names of the parties had only to be filled in. The upshot was that the Rotterdam judge recognised that a struggle against a Court of Appeal is hopeless and only increases the cost of going to law. Now he follows the opinion of the Court of Appeal and all the inferior judges do so regularly. But the High Court itself, you will say, is not bound on the Continent by its previous decisions and can overrule them. That is true and reversals of opinion sometimes occur, but the High Court is aware that the certainty of the law would suffer too much if it changed its opinion too often. In general the High Court stands by its previous decisions. A precedent may only be overruled if it is an old one and no longer conforms to the needs of modern times or if it is clear that it must be considered a mistake. In England the rule of *stare decisis* is often applied in such cases, so that there is in fact a difference between the value attributed to a precedent in England and on the Continent. But the difference is not so important as appears at first sight. The decisions of the High Court of a Continental country can for their value as precedents be compared with the judgments of the Judicial Committee of the Privy Council in England. Allen's remark concerning the Privy Council may also be applied to the continental High Courts: The Judicial Committee is not, in theory, so fully governed by its own previous decisions as is the Court of Appeal, "but it is only with the greatest reluctance that it departs from its own precedents."[4] That, too, is an exact description of the position of a continental High Court.

Now that I have tried to clear up these misconceptions, you may ask me: what then is the principal difference between the system of law formed by codification and the system of case-law? For one need only study law a little in both systems, to notice a real difference of principle between the two systems. Apart from the fact that on the Continent the rule of *stare decisis* in its strict sense is unknown, I believe the difference is in the first place a difference in the way in which a problem of law is dealt with and solved. On the Continent a lawyer begins by searching for a section of his code under which the case can be classed. In the system of case-law the lawyer searches out in the first place the precedents with which the case has the greatest affinity. A lawyer on the Continent must know before all other things the text of the various sections of the code. An English lawyer must know his precedents or how to find them at a moment's notice. Sections of a code are formulated as abstract rules; a precedent, too, can form an abstract rule, but often the lawyer must find out himself

[2] (1857), 10 Moo.P.C. 306. [3] International Law, Vol. IV, p.226.

[4] C. K. Allen, *Law in the Making* (4th ed.), p.227.

what are the material points of the decision and the *ratio decidendi*. The continental lawyer must therefore above all be trained in the method of interpreting and applying statute law, the lawyer in the system of case law must be trained in the method of analysing judgments. Those differences are certainly only a matter of degree, for countries such as England and the United States of America also have an increasing number of statutes governing matters of private law, and we on the Continent also have our precedents and ought to know how to read and analyse a judgment, but it is not our principal task. Students in our country are always warned against assuming that a knowledge of the law embraces only the ability to examine and cite precedents.

A second difference exists between lawyers educated under the system of common law and lawyers trained under the system of a code. Where the common law constitutes the nucleus of the private law, statute law is always suspect, not because it might tempt the legislator to be a despot—such a fear is not justified in a democratic State—but because the results of an abstract rule are always a little speculative and uncertain. On the other hand, the system of judge made law has existed for so many centuries in England, and lawyers are so accustomed to it, that to abandon that system in favour of a code would mean a revolution in the world of private law. It is almost superfluous to remind an English audience of this, but it is perhaps not superfluous to add that lawyers in the countries where a codification of private law exists are in the same way convinced that private law in the first place must be found in a written and systematic law-text. The danger that an abstract rule can have unforeseen and undesirable consequences does exist, but is mollified by interpretation. Of course the principles of the theory of interpretation are the same on the Continent as they are in England; Dutch students, for instance, might study to their advantage what Allen has written about interpretation in his book " Law in the Making." But notwithstanding the fact that we start from the same point, there is a slight difference in practice: the interpretation of a statute on the Continent, as I have mentioned, is more influenced by modifications in social relations and by changes in conceptions of social justice.

The third difference between the two systems consists in the part the textbooks play in the evolution of the law. On the Continent a good textbook gives more than a survey of the Code and the principal precedents. It often criticizes judgments, even those of the High Court. In this way the influence of textbooks on the decisions of the Court is much greater than it is in England. In England not so long ago, I believe, an author had to be dead and buried before his words could be quoted in Court. On the Continent a textbook and even an article in a review have often changed the decisions of a Court. Inferior judges find support in those books when dissenting from a sentence of a higher judge, even of the High Court itself.

What are the facts which, on the Continent, have favoured the movement for codification?

In the first place, from a historical point of view, the school which preached the law of nature must be mentioned.

The belief that the right law can be found by reason and by deduction from human nature, must lead one to attempt to put the results together in a systematic code and to proclaim that code as the law of the nation. But in order to introduce a code on that basis one would need a monarch who believes in the law of nature and has dictatorial powers to introduce it as statute law. Frederick the Great of Prussia was such a monarch. He promoted the establishment of the General Prussian Code introduced in 1794, a code with more than 11,000 articles.

The French Code of 1804 is also often considered as being a product of the doctrine of the law of nature, but the only true thing about that is, that the French Code was drawn up during the French revolution and that the course of the revolution was influenced by that doctrine. The French Code had become

a necessity because in France, too, many different systems of law existed. The French revolution turned France into one nation with a strong and centralised government. A situation in which a change of province or town also involved a change of law was an anomaly. Notwithstanding that, it took the energy of a man like Napoleon to achieve the establishment of the Code. Napoleon ordered a committee of four men to draw up a civil code within four months and the work was done in that time. The French " Code Civil " was accepted with modifications of greater or lesser importance by all Latin-speaking nations, both on the Continent of Europe and in South and Central America.

Besides the French Code, one can distinguish on the Continent four other types of civil code: the Austrian Code of 1811, the German Code of 1900, the Swiss Code of 1912 and the Soviet Code of 1921. For all those codes the greatest impulse towards the achievement of codification sprang from the desire to consolidate the different laws existing within the frontiers of one and the same state. Germany became one State in 1870. At that time there existed in Germany more than a 100 different matrimonial laws; the frontier between two systems of law might easily have cut through a house, with the consequence that when you were asleep a system of law governed your head, quite different from that which governed your feet.

In Switzerland not only had each canton its own civil law, but often in one canton several systems existed side by side. In the canton of the Grisons as late as the nineteenth century 18 different laws of succession were applied. Centralisation of the law was a necessity but the cantons jealously guarded their autonomy and their right to determine their own civil law. Therefore it was not until 1912 that Switzerland got its general Swiss civil code.

In England this great urge for codification—the great divergence of law within one and the same state—has never existed. It is a remarkable fact that although at the moment of the Norman Conquest a great divergence of law also existed in England, in no time after the Conquest a general English law was formed. It was chiefly a result of the centralisation of justice in the King's Court but the credit for creating a general law should be given just as much to the quality of the English judges.

In the United States of America the various States have with respect to private law the same independence as had the cantons in Switzerland. But a central authority to promote a uniform law like the English Court is lacking. The Federal Courts are highly respected, but too many cases are decided by local Courts and the Federal Courts must respect the statutes of the various States provided they are not unconstitutional. Therefore it is possible that in the United States of America the divergence of law will encourage codification in the same way as it did on the Continent of Europe. Important sections of private law have already been fixed in the United States of America in a Restatement of the American Law and there is a draft of a Commercial Code which is not a restatement but a revision of American commercial law. Both are private enterprises undertaken by a society of American lawyers. Often such a private enterprise has been the first step towards codification.

Besides a great diversity of laws in the same kingdom and a monarch's desire to immortalize his name, factors favourable to codification, there was also the uncertainty as to what was law, and the existence of too great a number of precedents determining the law, making it impossible for the subjects themselves to know the law. But even if all those favourable factors are present, it has always been very difficult to introduce a code into a country where codification has been hitherto unknown, though it is a remarkable fact, that, once introduced, lawyers become very quickly accustomed to the system. Then no one wishes to abandon codification. It may be because lawyers are the most conservative of all people; initially you cannot persuade them to favour codification and subsequently you cannot persuade them to oppose codification.

It is a remarkable fact that in the last twenty years in all countries having

a codification of private law a movement has arisen to revise the existing code. In some States that movement has already led to the drafting of an entirely new code, as for instance in Italy, Venezuela, Peru and Mexico; in other countries official committees are preparing drafts of a new code, as in France, Argentina, Brazil and also in the Netherlands.

What shall I say about that phenomenon? There are various reasons to be advanced in explanation thereof. The principal reason is the mass of precedents that supplement the code. It is a phenomenon that you can observe wherever statute law exists. After some time a consolidation of the statute with the new precedents is necessary. Nevertheless the phenomenon has with respect to a code a slightly different character from that which it has with regard to a single statute.

It is indeed one of the great advantages of a code that you can easily study law as a whole and that the art of the lawyer consists in combining by interpretation statute law with the general principles of justice. If the number of precedents increases too much one loses one's grip on the whole and the student of law has no time to learn the right method of interpretation in order to combine statute with justice, because he must cram his head with an infinite number of cases. I can give you as example my own country. When I was studying law fifty-five years ago, we had to know for our examination not more than twenty cases on private law and perhaps ten cases on penal law. Nowadays you can multiply the number by forty or fifty. The study nowadays is twice as difficult as it was in earlier times. And what is the result? Are the young barristers of to-day much more equal to their task than they were before? The contrary is the case. They cannot see the wood of justice for the trees of precedents.

A second argument in favour of revising the existing codes can be found in the new problems caused by the intensity of modern intercourse and by alterations in ideas about social justice. Problems concerning strict liability without negligence, or concerning the protection of labourers and farmers by coercive law can only be solved by Parliament. A judge is not the proper authority to deal with such problems. For even if the judge is willing to solve such questions, the evolution of the law occurs incidentally and precedents follow one another only at long intervals. For that reason your ex-minister Augustine Birrell declared as far back as the year 1900 in a retrospective survey of the law in the nineteenth century: " Judge-made law has played its part. To statute-law belongs the future, let us pray for well-drawn statutes."

This argument is of still greater importance in small countries where the machinery of judge-made law must, of course, work much more slowly as a consequence of the fewer number of cases decided in the courts.

A third reason for a revision may be found in the spirit of competition existing between all countries with codes. Nobody likes living in an old house in bad repair when he sees all his neighbours dwelling in new buildings, fitted up with all modern comforts. In France for instance this reason has been decisive. France with its Code Napoleon had always occupied a leading position among all the countries with a civil code. Just as one can find all the good English law-books in the possession of lawyers in your Dominions and even in the United States of America, so you can find the French commentaries in every library of the Latin countries of Europe and of America and even in countries like the Netherlands. But that pre-eminent position is being seriously challenged or, more exactly, it has already been lost. The German Code of 1900, the Swiss Code of 1912 and the Italian Code of 1942 are much more modern than the French Code. So France has seen China and Japan introduce codes modelled on the German Code, and Turkey has adopted the entire Swiss Code with but few modifications.

Even in South America the influence of the French Code is diminishing. It is true that in 1942 Venezuela introduced a code that still agrees in detail with

the French Code, but that Code is often called " the last honour " rendered to the French Code. In Brazil, Argentina and Peru the influence of the German and Swiss Codes is increasing. Therefore France wishes to regain her influence and set up in 1946 a committee to draw up an entirely new French Code.

Having indicated the reasons why a movement has come into being for reforming the existing codes of private law, I will sketch in a few words how the various countries are trying to put this plan into execution.

In France the Government has appointed a committee to prepare a new code; the committee is divided into three or four sections, which are drafting projects for the different parts of the code. Each project is discussed in plenary sessions of the committee. The results of these meetings appear yearly in verbatim reports.

An entirely different method has been followed in the Netherlands. There the one man system is applied. This system, which was also applied before in the drafting of the Swiss Code, guarantees better than the committee system the coherence of the whole. For the rest, the draft bill is discussed in a committee of lawyers, but the bill remains the responsibility of the chairman of that committee; he can make use of the remarks of the members of the committee to whatever extent he desires. In most cases their remarks are well founded and their proposals are accepted. But often there are conflicting opinions, and then it is not by voting that the decision is arrived at, but the chairman accepts the solution he prefers, for he is the only man responsible for the text that will be handed to the Government. On many points, too, the opinion of experts other than lawyers or of people interested in the matter is asked and drafts are submitted to them.

Another point worth noting is the consulting of Parliament on points of a political or social character, as for instance questions about labour legislation and divorce. In our House of Representatives a permanent committee for private and penal law exists. In exactly the same way as technical questions of law are discussed with a committee of lawyers, the social and political questions are discussed in the Parliamentary committee. There it is not a draft that forms the subject of the discussion but only general questions.

So much for the method of working.

It is much more important, I think, for you to hear something about the questions that arise in any country that is busy reforming its code.

Firstly, there is the question what a reformed code should contain. In France a distinction is made between civil law and commercial law. Commercial law may be found in the commercial code, civil law in the civil code. This distinction has also been made in other countries. Switzerland on the contrary has, like England, rejected the distinction between commercial law and civil law. The consequence has been that commercial law, the law of bills of exchange and cheques, of joint stock companies, of carriage by sea and so on, must appear in the code of private law. In the Netherlands, too, we are going to accept that system in future.

A second point is the question whether there should be a first book containing general rules applicable to all matters. The German Code contains such a general part, a result of the German doctrine of the nineteenth century. One can find in it general rules for the subjects of rights, the objects of rights and the relations existing between the subjects and the objects. The German Code deals for instance with the " juridical act " in general. Questions that are treated elsewhere only in connection with contracts, as for instance questions of void and voidable, relations between agent and principal, are treated in the German Code in a more general manner for all juridical acts; e.g., not only for contracts but also for the legitimation of children, with the payment of debts, the delivery of goods, the conveyance of real property and so on.

The Swiss Code, in spite of the fact that it is younger than the German Code, had not adopted such a general part; everything which the German Code in its

general part says about the subjects of rights, is placed in the Swiss Code in the Book on family law and the status of persons; everything which the German Code in its general part says about the objects of rights is placed in the Swiss Book that deals with the law of property; the rules concerning the relations between subjects and objects can be found in the Swiss Law of Contract.

It is curious to note that the French committee has rejected the idea of a General Part but nevertheless has drafted a whole Book entitled " the juridical act ".

The Dutch draft bill occupies an intermediate position. It does not confine to the law of contract questions such as the difference between void and voidable, or the rules concerning defects in volition, but on the other hand it does not go so far as to treat those questions so generally as is done in the German Code; it only deals with these questions in so far as they concern the law of property.

Another general question concerning the reform of the codes of private law is connected with the increasing influence of public and administrative law on the relations between private persons. The parties are no longer free to fix for themselves the terms of their contract. They must pay attention to labour laws, land laws, price regulations, and so on. Is it advisable to include all those prescriptions in a civil code? The Italian Code has done it in a considerable number of cases. This procedure offers the advantage that one can find all the rules concerning the same subject together. But on the other hand such a fundamental difference exists between statute law imposing a penalty and private law enforceable only by civil proceedings, that most civil codes do not include rules which do not form part of private law.

The only point that must be resolved in the civil code is, what is the influence of those statutes on the contracts and the rights of the parties? Is a contract which contravenes a rule of penal law always void, or can such a contract still be valid as between the parties so that the only consequence of the statute is the application of a penalty? The question is a complicated one. In most cases the contract will be void, because it will be against public policy to condemn in Court a party for having failed to execute a contract forbidden by law, but it is possible too that a prohibition is directed only against one of the parties, for instance an officer can be forbidden to buy or to sell certain goods. If in such cases the other party does not know that a contravention has taken place then the contract may very well be valid.

In the law of contract still another phenomenon cannot be neglected by a modern codifier, I mean the increasing influence of private companies and trade organisations on the terms of the contracts concluded by them or their members. These companies and organisations are to-day legislators in their branches of business. Their device is: you have only to sign, we do the rest.

In three different ways the legislator has reacted upon such contracts in which freedom of contracting notoriously exists on one side only.

The first way has been followed in the new Italian civil code. In art. 1341 different clauses are enumerated which are allowed in a contract prepared in advance by one of the parties only when they are especially approved in writing by the other party. Such clauses are, for instance, those which contain a limitation of liability, the power of cancelling the contract or suspending its execution, restrictions on the liberty of contracting with other people and derogations from the ordinary rules of jurisdiction. Such a legal provision does not go to the root of the matter. Its only consequence is to make necessary the fulfilment of a new formality. Moreover it is a very unpractical formality in the cases of the delivery of tickets, bills of lading and so on, when it is not usual for the recipient to sign a document.

A second way is followed in some countries where the government supervises certain branches of trade or where no company can carry on a certain trade without a licence from the authorities. In these countries it is possible to make the use of a model contract or of certain contractual clauses a condition for the

exercise of that branch of trade. In that way for instance the Belgian government has a great influence on the terms of the different insurance policies.

The Netherlands have taken the initiative towards another solution. There the different trades have a certain autonomy; they can establish rules binding all persons belonging to the same trade. A Central Board and the Ministry of Commerce have a control over the regulations made by the representatives of each trade. It is evident that in a country where trades possess such an autonomy, a general civil code can abstain from giving rules in detail for contracts requiring a circumstantial regulation in the codes of other countries. The task of the legislator with regard to such contracts as insurance or carriage by sea, contracts for which standard contracts are generally used, can then be limited to enacting some coercive rules established in the public interest.

I have come to the end of my lecture. I have tried to sketch the supposed and the real differences between the systems of case law and codification and I have given you a survey of the development of the codifications and their reform on the Continent.

One question I have not yet treated: which country has the better system, the country with a codification or the country with case law?

One must be careful before giving an absolute answer to that question. One must not underestimate the individual character that law has assumed in each nation. It may be that this individual character has not much to do with the innate qualities of the persons who constitute a nation, but none the less it exists as a consequence of education and tradition. Even if you bring together lawyers of different countries to search for the best rule independent of national influences, each of them will usually consider his own law to be the best. That would not be an expression of patriotism, but a consequence of education and perhaps of conservatism: a man knows what he has practised; the advantages of what has not been tried in practice are always a little open to speculation. I can only say that where the conditions exist which make it possible to introduce and to maintain a Code, the system of codification must be preferred to the system of case law.

I have put the question on purpose in the form: Which country has the better system, the country with a codification or the country with case law instead of a codification? I have not given an answer to the question which country has the better system: the country without a codification or the country without case law.

With the aid of a comparison I will give you the reason why I skipped that question. Two years ago a Dutch local newspaper contained the following item: " Read in the waiting room of the railway station:

" Sandwiches with ham ... ... 10d.
" Sandwiches with cheese ... ... 8d.
" Sandwiches without ham ... 6d.
" Sandwiches without cheese ... 4d."

The consequence of that piece of news was that the next day a price control officer visited the waiting room, because the difference in price between sandwiches without ham and those without cheese was not in accordance with the regulations fixing maximum prices. Once in the waiting room the officer realised that the whole affair was a journalist's joke. The proprietor of the waiting room, however, was so angry that he sued the editor of the newspaper for damages for libel. The case was dismissed, the judge saying that the plaintiff ought to have some sense of humour. Moreover, there was nothing insulting in the item; and a difference in price between a sandwich without ham and one without cheese might be justified by other factors, as for instance the quality of the bread.

Now you understand why I do not like to compare the system of law without codification with a system of law without case law. The quality of the law can be determined by entirely different factors which I have not mentioned, for instance by the qualities of the judge. It is a well-known saying on the Continent:

a bad statute with a clever judge is a hundred times better than a good statute with a bad judge. I conclude therefore with the words I have already quoted from Birrell: Let us pray for well drawn statutes; but I add: let us pray also for judges such as an old thirteenth century French textbook describes them: clever men with an independent spirit and who can stand the weight of honours.

TRUSTS

THE TRUST PROBLEM AS SEEN BY A FRENCH LAWYER*

[*Contributed by* PROFESSOR H. BATIFFOL.]

THERE is no French lawyer doing business with English people or Americans who is not faced with the institution of the Trust. We find a trustee acting in France as a representative of an estate, in the interest of a person labouring under disability, for the liquidation of assets resulting from an order of bankruptcy. A Bank whose business it is to manage the property of a third party takes the name of Trust Company. We also need to be reminded that the word " Trust " has been appropriated by conversational French to mean powerful groups of business undertakings. Not even International Law is silent on Trusts such as concern the Bank for International Payments, or the Administration of Italian colonies. What then is the meaning attached to a concept which has so many varied aspects?

The primary idea that the trustee manages someone else's property will easily lead the French jurist to believe that it is an attorney he is dealing with, yet one need only recollect that foundations such as the Carnegie Institute are administered by trustees to perceive that these individuals can intervene without there being any beneficiaries at all; and this is not, as we shall see later, the only difference between Trust and Representation.

The matter grows in interest when it is considered that the Trust, owing to the variety and municipality of its applications, is an essential ingredient of English judicial thought. An American asked me once: " How can you live without Trusts?" The fact is that we do live without Trusts, and it is clear that we are faced with one of the most remarkable of the divergences existing between the Anglo-Saxon systems and, I believe I am right in saying, all the Continental legal systems. In consequence, it is a good idea on the part of the promoters of this Conference to have placed this subject on the agenda.

But it is the very interest of the task that makes it such a difficult one. A French commentator cannot speak of the French law of Trusts, as it does not exist, and I believe I can also say that our friends across the Channel are so accustomed to the institution of the Trust that they cannot easily understand why we encounter such difficulties in understanding its operation. The development of the Trust has been intimately bound up with the general history of English law, and with the mode of thought that has guided Englishmen in their legal intercourse. It is not surprising that French jurists, schooled as they are in different traditions, should experience some difficulty in familiarising themselves with this institution.

This paper, whilst trying to give a description of the Trust which may help the French participants to grasp its framework, attempts in the first place to explain what disconcerts us in the Trust, and secondly to give an idea to our English guests of the various methods by means of which French law obtains the results arrived at by the Trust. We shall then be in a better position to hear tomorrow the English paper which goes further into the subject.

I should like at the outset to underline the difficulty of the subject matter, and to proffer an apology for the fact that the technical terms which I use can only be approximately exact. I am trying to survey a system which is alien to us. I put forward questions, and I am asking our English guests to treat what I shall say not as affirmations claiming to be correct, but as an attempt at understanding which requires the co-operation of everyone, since its object is to explore

* Thesis for the Anglo-French Legal Conference, 1949.

a legal system with a mind moulded by a different system. I am not here to teach, but to learn by stimulating the debate.

The trustee is shown to us as being the manager of property or proprietary rights of a third party. The beneficiaries of this management are not always defined. When they are, they are known as Cestui que trust, a term imported from mediæval French, which means the person who relies on somebody or, more briefly, the Cestui. The word " Trust " means, in fact, " reliance," and this idea appears to be fundamental to the understanding of the spirit and organisation of the institution.

The French lawyer, as we have said before, is immediately tempted to see in the trustee simply the representative of the Cestui, and in fact the Cour de Cassation, in a judgment dated the 4th June, 1941 (Sirey 1944.1.133, *Szlapka v. Geffros*), has defined as the attorney of the heirs a trustee who was acting in France on behalf of an American succession, whilst admitting as a consequence thereof his claim in damages for a tort sustained by the deceased in France. But such a description is no doubt an unsatisfactory one. In fact, not only does the Trust serve, as we have seen, to create an estate where there are no beneficiaries, but even where the identity of the Cestui is defined, one cannot say that the trustee is his representative.

In fact, the trustee is considered—and this is the essential point—as the owner of the property in which he has vested rights which he exercises. He has the " legal ownership," he is in law the owner of the " trust property," and has a vested interest in the rights constituting the Trust.

In all the foregoing, we have avoided using the word " administration " of someone else's property, as this might appear to establish a distinction between " administration " and " disposition ". The term " management," being wider, includes the rights of alienation which the trustee possesses. The trustee has the right to alienate property in trust if the trust instrument (deed or will) or the description of his powers by the law or the Judge has not excluded this right. Let it be stressed that he must, in the use he makes of this power, comply with the purpose for which the Trust was created, and with the object of the Trust. None the less, he has the sole ownership of the trust property.

One is then led to conclude that the Cestui's position is reduced to that of an ordinary creditor: he can demand from the trustee payment of income accruing from the trust property if he is entitled thereto and, more generally, can claim the advantages set out in the instrument creating the Trust. He appears to be the creditor of the trustee, and in fact, if the latter has the ownership of the trust property, how could the Cestui have anything but a personal claim against the trustee? Can there be any half-way house between a real right and a personal right?

It is precisely this intermediate right which English law has established. The paper you will hear tomorrow will inform you that the Cestui has less than a real right in the trust property, but that he has more than an ordinary right " in personam." He has a right in Equity, namely, an "equitable right."

Many of you know the fundamental distinction between Common Law and Equity in England. A brief reminder for the sake of clarifying the sequel is that, several centuries ago (from the middle of the 15th century as far as Trusts are concerned), plaintiffs whom Common Law decisions did not satisfy, as being too rigid and ill-adapted to new circumstances, petitioned the King's Chancellor, asking him to solve their cases in a different manner in " Equity ". This step links itself up with the idea that in England, as was the case in France during the Middle Ages, the King is the fountain of all justice, and he can, personally or through his Chancellor, try all cases whenever he considers this to be necessary. Justice is withheld, and not delegated. The Chancellor, unlike the Common Law Courts, is not bound by precedent. The development of these actions placed directly before the Chancellor led, as the latter could not personally attend to everything, to the creation of a new sort of jurisdiction growing simultaneously

with the others, and also as a result thereof there appears a new body of judge-made rules, which ultimately became just as precise as those which had grown out of the Common Law. This evolution has often been compared to that of Roman Law, when the Praetorian law displaced the Jus Civile, in order to remedy through the intervention of the Praetor the complications and the rigidity of the Jus Quiritium.

Originally then, the Cestui is in an almost helpless position as regards the trustee. He has relied upon him by transferring his property to him, and he has no actionable claim against him. The explanation is the more satisfactory when it is remembered that Trusts began, so it is said, as a system of public fraud—a debtor assigned his property to a friend in order to avoid attachment or distraint thereof. The corporate body, which has not the capacity to own landed property, resorted to the same method, the faithful transferee guaranteeing the transferor the income of the transferred property. But on such transfers being lawfully effected, when there were valid reasons that one and the same person should not have both the control and the enjoyment of the property, it appeared contrary to the doctrine of Equity that the Cestui should be left to the mercy of the trustee.

In the eyes of the Common Law Courts the trustee still has the ownership of the property; some will hold that this is due to a traditional and excessive respect for form and for precedent, too closely connected with remote cases and circumstances. But it seems that English law has once more discovered empirically how helpful, indirectly, are solutions which were arrived at originally by a quite different form of reasoning. It appeared to English Judges that the management of someone else's interests could only be well conducted if the person whose duty it was to administer them had the rights and powers of the owner. This view renders unnecessary the difficult distinction between an act of administration and an act of disposition, for the good management of someone's estate often involves a power of alienation; at the same time it simplifies the position of the administrator as regards third parties. It obviously presupposes a certain degree of reliance on the trustee, and this is undoubtedly the characteristic trait of the system; but this reliance is not blind. To be more precise, the Cestuis demanded of the Chancellor that their rights be recognised in Equity and protected by legal action.

The nature and quality of these rights are perhaps the most delicate point for a French jurist to grasp. English Courts have on many occasions confirmed that the Cestui is not the trustee's creditor. They desire apparently to strengthen his position by recognising his rights as having a direct bearing on the trust property, whilst protecting, however, the freedom of action of the trustee, whom they do not wish to treat as an ordinary debtor of the Cestui. My impression is that, in order to help in understanding the system, reference could usefully be made to the attitude taken by French law with respect to the *usufruitier*[1] and the *nu-propriétaire*[2]: each has a real right in the estate, and Civil Law tries to prevent the *nu-propriétaire* from considering himself the creditor of the *usufruitier*. Naturally the difference between the trustee and the *usufruitier* remains a wide one, because the trustee, unlike the *usufruitier,* makes no profit out of the trust, and because the *usufruitier,* unlike the trustee, has no right to alienate the trust property. On the material plane, there is no connection whatever between the two institutions, but when considering simply legal technique one notices, in both cases, the desire to avoid the danger that contractual liability should reduce the freedom of the person who has possession of the property, thus placing him at the mercy of the Cestui.

But in both these cases it has not been possible to adhere strictly to the idea of having two real rights co-existing in the same estate without admitting any obligations between the owners thereof. In the same way as French law permits

[1] *Usufruitier*—corresponds to the life-tenant in English law.

[2] *Nu-propriétaire*—corresponds to the remainderman.

the remainderman to control the management of the usufruct by placing in his hands an eventual action at law leading to the forfeiture of the usufruct for abuse of enjoyment, so the Cestui can sue the trustee for not complying with the directions of the Trust, such action sometimes involving criminal liability for breach of trust. The Cestui will even have a right of action against the trustee in order to obtain the payment of income, if such payment is provided for in the Trust instrument, but he cannot give instructions or directions to the trustee, as the latter is not his agent, and the trustee is alone responsible for management unless the settlor has expressed a contrary intention in the Trust; but if this right of direction is coupled with a power of revocation, a right which the maker of the Trust can also reserve to himself if he happens to be the Cestui, there would then be no Trust, because the freedom of the so-called trustee would be too greatly compromised. There would be a simple mandate. The position of the Cestui has, however, been consolidated by allowing the Judge, on his application, to grant injunctions against the trustee, restraining the latter from doing such and such a thing as contrary to the object of the Trust, or even with a view to compelling the trustee to take such useful initiative as may have been neglected by him.

Default on the part of the trustee also permits the Cestui to take action directly against third parties in a way which such a learned author as Monsieur Lepaulle does not hesitate to call "action oblique,"[3] in this sense, that the Cestui is exercising the trustee's right and not his own. This feature of the system indisputably draws the Cestui nearer to being the trustee's creditor. It brings him even nearer to being the holder of a real right, since he will be able to enforce against third parties his claims for recovery of property which the trustee has alienated without authority, provided that the third party is in bad faith, that is, that he had knowledge of the Trust, or gave no valuable consideration for the property acquired. This will immediately remind French jurists of the conditions governing the exercise of the paulian action, which goes to prove that problems which had widely different starting points have given rise to solutions which are remarkably similar. Here again, it may be thought that the Cestui's position is like that of a creditor, but as his claim is for specific property, one must admit that his right in Equity, enforceable as it is against third parties, resembles very much a right in rem.

On the other hand, the position of the Cestui can only be fully understood if we examine the connection between the trust property and the trustee's own property. It is said generally that the trust property is distinct from the trustee's own property, and as a result of this, that his personal creditors cannot levy execution on it, and that it does not devolve on his heirs. But since the trustee has the legal ownership of this property, the position is similar to cases to be found in French law, where a person's estate is divided into distinct portions. An heir who takes subject to benefit of inventory, keeps his own property separate from that of the estate which vests in him but which he is under a duty to wind up. A shipowner also draws a distinction between his marine assets and his land assets when charging each category with the payment of different debts.

As the trustee, however, in the absence of an express declaration on his part to the contrary, is personally liable on contracts he makes with third parties, creditors can execute judgment on the trust property only on their furnishing evidence that it is impossible or difficult for them to obtain satisfaction out of the trustee's own property. It ensues from this, that the trust property, not being subject to the claims of the trustee's personal creditors, or to the claims of the trustee's creditors as such, will, as a rule, and in the absence of dispute, be reserved to the Cestui, who has then a sort of preferential right, as well as the right to follow the trust property in the hands of whatever person it happens to have come to, that is to say, he has the two essential and characteristic

[3] "*Action oblique*"—to be likened to English third party procedure.

prerogatives of a real right. His right, in fact, which is called an equitable interest, is an interest in either movables or immovables, depending on the nature of the property to which it is attached. It can be added that the Cestui's personal creditors can enforce their claims against him only after the property of which he has the legal ownership has been exhausted.

In conclusion it appears that the Cestui has at one and the same time some of the prerogatives of a creditor and some of the prerogatives of the owner of a real right. He is not purely and simply the trustee's creditor, because it is the intention of English law that the latter should enjoy the freedom of action of a beneficial owner, with, naturally, a duty to perform, a duty which is defined by the instrument creating the Trust, but the proper discharge of which is a matter of conscience upon which one has to rely. The trustee is not therefore a debtor of the Cestui bound to submit to the latter's claims and requests. But on the other hand, in order to consolidate the position of the Cestui, who might eventually find himself seriously compromised by the ultimate default of the trustee, he is granted some of the prerogatives of the owner of a real right, namely, a sort of preferential right, and a right to follow trust property. And this, in the final analysis, coincides with the idea that if the Cestui is not purely and simply the creditor of the trustee, just as our own *nu-propriétaire* is not the creditor of the *usufruitier,* it is because he has, like the *nu-propriétaire,* some sort of real right in the trust property.

The above indications appear to sum up the respective positions of trustee and Cestui. The French jurist will now have a better understanding of the manifold applications of the Trust, and these I shall now examine rapidly.

We meet them at the outset in the management of the interests of persons labouring under legal disability, notably minors; the absence of legal protection for spendthrifts under English law is remedied in practice by the placing of the spendthrift's property in the hands of a trustee; likewise, and without wishing to identify the status of a married woman with that of a person under a disability, one can still find in England, as in France, as Monsieur Lepaulle remarks, the head of a family transferring his daughter's dowry to a trustee in order to protect it.

But the Trust gives more curious and precise assistance in a number of cases where the identity of the property owner is uncertain. This is so, for instance, when assets belong to persons abroad, when an estate is *bona vacantia,* or in every case where, in France, a judicial administrator or a sequestrator is appointed by the Court. The same applies to bankruptcy, where the bankrupt's assets, although belonging to him, are taken out of his control for the benefit of the creditors; to a succession accepted by an heir subject to benefit of inventory, as the heir must apply the deceased's assets to the payment of the deceased's debts. The trustee holds the office corresponding to that of our testamentary executor, just as effectually as, and with a greater freedom of action than, the latter.

In the third place, the Trust displays all its merits in cases where the identity of the beneficiaries has not been ascertained.

Last of all, the Trust is so flexible an instrument that it finds its way into many other institutions, the operation of which it improves. It effects transfers in guarantee which have the same functions as our mortgage or pledge; it helps to create usufructs and substitutions.[4] Recourse is had to it in order to explain that a contract is capable of creating rights in favour of third parties, by stipulating in the deed that one of the parties to it is to hold on trust for the third party who is the beneficiary. Finally, the Trust has been applied on numerous occasions to company matters. By recourse to it a corporate body has been enabled to operate before the identity of its members had been ascertained. The normal framework of the company has not for this reason been done away with, for it involves a body of rules defining more precisely the rights of each of its members, but the concept of the Trust introduces a large degree of flexibility which

[4] *Substitution*—settlement.

is counteracted by the control exercised by the Courts. The surrender of voting rights to a trustee who issues " trust certificates " made to bearer and negotiable on delivery, has paved the way for the appointment of the same trustees to act in connection with several companies, and this has led to grouping in the hands of one person or of one company the control of several business concerns. It is this centralization of enormous powers in the hands of a few, which has given to the word " trust " the meaning it has in France in the newspaper and political worlds.

If we endeavour to outline by what means French law meets the requirements which in England are satisfied by the Trust, we observe that the idea of representation plays an important part. To be sure, the idea is known to English law, and is utilised to create the relationship of "principal and agent," which corresponds to our mandate. The situation is clear because the *mandant*[5] gives instructions to the *mandantaire*.[6] We make use of it too in the representation of minors, although it is obvious that the minor cannot give instructions to his representative, just as the Cestui does not give orders to the trustee. But we keep this state of affairs within the limits of representation because we consider it to be a question of legal representation. It has often been objected even in France, that it is no longer representation, since no account is taken of the will of the person represented. The objection is not, however, a decisive one, because there cannot be representation unless the *mandant* allows the *mandataire* to make use of his initiative to a certain extent, for without this, the latter would be reduced to a mere mouthpiece of the former. The difference can be summed up by saying that representation, in mandate, has its origin in a contract which defines the field of its application, whilst in the case of persons suffering from a personal disability, it is defined by law.

Furthermore, French law applies representation to the management of estates where there is uncertainty as to the identity of the estate-owner. The curator of *bona vacantia*, the judicial administrator for settling disputes in connection with estates, and the trustee in bankruptcy, are appointed by the Court to administer property where there is uncertainty as to the identity of the owner and where it is difficult to decide on the ultimate destination of the property. Here again, objection is raised against the idea of representation on the ground that the person represented cannot voice his opinion, but we have just seen that logic is not sufficient to defeat the system. It is the judgment of the Court which, basing itself more or less on the law, appoints the administrator and defines his powers. As regards the heir taking subject to the benefit of an inventory, the law has limited his duties as representative of the deceased.

The French system is more open to criticism when we examine *fondations*.[7] We have maintained that property applied by the *fondation* to the attainment of its object does not belong to a specific person, and have declined to grant to the managers of the *fondation* the status of estate owners. In consequence it is necessary that the property of the *fondation* be vested in the *fondation* itself, considered as a corporate body. Everyone knows the numerous drawbacks of this system, the least significant of which is that the corporate body is often a vague reality whilst the administrators alone exist. The English conception of trustees, owners in law of the transferred property, appears to be much superior, and to correspond more exactly with reality. Undoubtedly it is imperative to have a form of control which will be exercised by the Courts on the petition of any interested party.

The other applications of the Trust seem to be less characteristic, for they relate to legal problems which we have solved in a different manner. I should

[5] *Mandant*—the principal.

[6] *Mandataire*—the agent or attorney.

[7] *Fondation*—this is a gift, usually of money, to be applied for a specific purpose. The Carnegie Institute is an example of a *fondation*. It resembles the Charitable Trust with this exception, that a *fondation* need not necessarily be charitable, benevolent or educational.

blame myself, however, if I did not mention that in the revised edition of Planiol, Messieurs Ripert and Boulanger have analysed the stipulation in favour of a third party as being the representation of the interests (not the person) of a third party, which goes to show the degree of relationship there is between this concept and the institution which English people call the Trust. But it is also important to stress that wherever the Trust is introduced it brings with it the element of reliance which one person places in another, which makes the working of the institution more flexible and which, in our opinion, seems to be the corner-stone of the system. We shall now endeavour to bring the discussion to a close.

The Trust rests upon the confidence which one person has in another. For the proper discharge of the trustee's duty one has to rely on his conscience. English people like this attitude. They have a practical viewpoint, and consider it safer to rely on a man than on learned rules, or even simple ones, which life in its complexities is liable to frustrate. Their respect for individual liberty is in agreement with this attitude: the dignity of the trustee requires that he should not be curbed by limited powers. His intervention will be the more effective, and the interests of everybody will benefit proportionally as a result thereof. Furthermore, the Cestui is more often than not ill-qualified to look after his own interests; in consequence the system will work to his advantage as well. The office of trustee, particularly in the United States, is being held more and more by Banks, the famous Trust Companies. Their competence and the range of their resources are indisputable advantages.

Naturally, there is room for abuse, and it has been necessary to protect the Cestui. The necessity of this measure reconciles itself with the spirit of the system at the cross-roads where Common Law meets Equity.

The French have seen things differently. Their starting point is certainly their taste for logical ideas. Only one of two persons having interests in the same thing can be the owner thereof, and he must obviously be the ultimate beneficiary of the administration. Therefore the person who manages the property is no more than an agent. In a very curious case referred to the Cour de Cassation, where it was argued against the administration of the *Enregistrement* that the trustee of an estate had possession of the assets of the deceased, the administration, in a remarkable memorandum, emphasised that one could not conceive of "double ownership by trustee and beneficiaries." (Req. 19 Nov., 1941, S.1942, I.129, *Bonnefous v. Enregistrement.*)

This logical attitude coincides with a moral attitude which is more prevalent in France than in England, and which is the mistrust, the fear of abuse, specially when this threatens to prejudice people worthy of protection. The person who administers someone else's property, being merely an agent, will only have such powers as are given him by law or by the Judge, and as a general rule, he will have no power to alienate the property. Our law is still labouring under the old idea that capital should in normal circumstances be kept in specie, whilst the English have been more inclined to believe that the good management of capital implies alienation thereof. We are very cautiously moving towards the latter standpoint: the guardian may sell the immovables belonging to his ward, subject to the authorisation of the Family Council and the sanction of the Court. The trustee in bankruptcy disposes of the assets under the control of the Judge; the heir taking under the benefit of an inventory, winds up the estate whilst complying with strictly controlled formalities.

Therefore the difference between the two systems tends to disappear in practice, for the trustee also draws authority from the Judge for acts which do not fall within the range of his authority. But there remains, as is often the case in comparative law, a difference in the mode of evidence and onus of proof. In so far as the trustee is concerned, a presumption is raised in favour of his freedom of action. Our legal or judicial administrator has only limited powers, owing to the fact that he is not administering property which belongs to him. When a person is possessed of a right, he is presumed to have the capacity to

exercise this right, but authority to act on behalf of someone else must be proved. The difference which thus exists is due, as in many other cases, to a difference of mentality which is itself the result of a difference in social structure. A sound comparison of the two systems is therefore very difficult: for different premises, different rules. Pascal, in spite of his genius, was wrong to use irony towards jurists when he says: " Truth on this side of the Pyrenees, error beyond."

However our system seems quite manifestly deficient in its conception of the *fondation*. Secondly, one is more inclined towards an attitude of natural reliance than towards the opposite attitude. Our law is itself well aware of this, since it generally presumes good faith, and requires that bad faith be proved. (Art. 2.268 Code Civil.) But the English system is built up on the distinction between Common Law and Equity. Yet this distinction is an accident of history. The English have been able to make the best of it owing to their remarkable flair for expediency and utility. One could not dream of introducing it into French law; one does not deliberately invite accidents. This distinction is the source of so many complications that it would be interesting to discover whether it has more advantages than drawbacks. French law has always been guided by its care to protect the unity of the law, whilst rendering the general rules, in as far as possible, sufficiently flexible to be adapted to particular cases. Owing to its perhaps excessively sceptical mentality, it has always stood in fear of the appeal to conscience, which it considers to be dangerous. This attitude is not one which is easily changed.

The future lies perhaps in the development of the idea that specific rights are granted in view of a specific object, and this seems to be the ultimate meaning of the Trust. If the trustee has rights, these are granted to him for the fulfilment of his duty. Likewise, one ought to concede that the administrators of a *fondation* have the entire management and control of the estate which they administer, but they must pursue the object of the *fondation*.

Monsieur Lepaulle has boldly likened the Trust to an estate applied to a definite purpose. We may find that this analysis does not correspond entirely with the Englishman's conception of the Trust. But there appears to be little doubt that if we endeavour to borrow from English law whatever truth and usefulness the Trust contains and we lack, we shall have one day to turn towards the conception of rights applied to a purpose.

THE TRUST AND THE CIVIL LAW WITH SPECIAL REFERENCE TO PANAMA

[*Contributed by* Dr. Ricardo J. Alfaro.]

The adaptation of the principles, methods and practices of the English trust to the civil law is doubtless one of the most interesting events in the history of law. This legal grafting took place a little over a quarter of a century ago and in its short life it has had a successful development in Latin America.

Before the first two decades of the present century, trusts could be executed or established in the Canadian Province of Quebec, in the State of Louisiana and in Scotland by the technique of assimilating trusts to the civil contracts of mandate or deposit, combined with a broad and liberal interpretation of the law by the local Courts. But in none of these countries were there statutes regulating the establishment of trusts in conformity with civil law conceptions and nomenclature. It is apparent that for a long time the enactment within the civil law of statutes regulating the trust as a separate institution was considered an impossibility, and that an impassable chasm was believed to exist between the common law and the civil law.

Experience in the field of trusts has shown that the differences between the

two systems are not so great as appear at first sight and do not constitute insuperable difficulties. The laws enacted in Panama, in Mexico and in Puerto Rico, regulating the establishment of trusts under the denomination of *fideicomiso,* are conclusive evidence of this fact.

There is no doubt that in many countries of Roman legal ancestry, lawyers have been concerned with problems that could not be solved by the application of the rigid provisions and techniques of the civil codes in force. In some cases those lawyers had to reach the conclusion that the thing their clients wanted or needed just could not be done. In other cases, where the lawyers had some knowledge of the common law, they could see that the solution of their problems was possible by the establishment of a trust in accordance with the principles of the common law.

Pondering over several of those problems, I entered into a comparative study of the trust principles and the provisions of the Colombian Civil Code which was in force in Panama until 1916, on the subject of *fiduciary property*. Such provisions deal with the establishment of *fideicommissa* along the lines of the old Roman *fideicommissum* and of the *fiducie* of the Province of Quebec.

In accordance with the provisions of the Colombian Civil Code, *fideicommissa* can only be instituted on estates, by will or testament. According to the Quebec Civil Code, a *fiducie* can only be created in respect of property donated or bequeathed, and for the benefit of persons to whom legacies or donations can lawfully be made.

The Colombian Code is substantially the same as the Chilean Code, drafted by Andrés Bello, which is also the basis of other Spanish-American Codes. The Colombian Code contains a further restriction: only one kind of *fideicommissum* can be created, namely, the conditional: the estate is transferred only if a certain condition, positive or negative, is fulfilled by the beneficiary.

As can readily be seen, the field of action left to *fideicommissa* by the Bello Codes, and to the *fiducie* by the Quebec Law, is extremely narrow. In Lower Canada, however, the fact that in the English text of the civil code the word *fiducie* has been rendered by the word *trust,* and the fact that the trustees are vested with extensive powers, have contributed to make the trust system operate with virtually the same results as in the common law countries.

In Colombia, on the contrary, the chapter of the code on "fiduciary property" is a dead letter. The Colombian writer, Copete, in his work entitled "La fiducia," states that he does not know of one single case in which a *fideicomiso* has ever been created. I can add that in the legal literature which I have read, I have never found any reference to *fideicommissa* created in Chile, in Ecuador or in Colombia in conformity with the fossilized provisions of the Bello Code.

Therefore, after pondering over the legal problems above mentioned, it was clear to me that they could be solved neither by means of the regular techniques or institutions of the civil law nor by the establishment of conditional *fideicommissa* on the old Roman model. On the other hand, my limited knowledge of the common law showed me how easily those problems could be solved by means of a trust. Thus the thought came to me that it would be a very useful thing to have a similar institution incorporated in the legislation of civil law countries. I then reasoned as follows: the essential difference between the Roman *fideicommissum* and the English trust is that while the Roman institution is exclusively testamentary, and can only deal with property transferred by inheritance, the trust may be an act "inter vivos" whereby all kinds of property may be transferred. For this reason the trust may be resorted to in an infinite variety of commercial or civil operations. I concluded, therefore, that if the law should provide that *fideicommissa* may be created not only by testament but also by an act "inter vivos" and the *fideicommissa* may cover any and all kinds of property, we should have a civil institution entirely equivalent in its effects to the trust of the Anglo-Saxon countries. On that simple basis I

wrote my small treatise of 1919[1] on the adaptation of the trust to the civil law, and drafted a bill which subsequently became the Panama Trust Law of 1925.[2] That bill is the first effort ever made in a civil law country to incorporate the principles of the English trust in a statute drafted in conformity with civil law nomenclature and conceptions.

I do not intend to bring up the much discussed question whether the English trust was inspired or not by the Roman *fideicommissum*. Very eminent jurists have expressed contrary opinions on the subject and most assuredly every lawyer has reached his own conclusion. But from the practical standpoint which I have always maintained in dealing with these matters, I desire to point out the fact that, as we examine the two institutions, separated as they are by a historical distance of at least ten centuries, we find the following points of contact:

1. *The cause.* Laws which in a greater or lesser measure established restrictions either to receive an inheritance or legacy or to own property; succession laws in Rome, statutes of mortmain in England.
2. *The purpose.* To evade such restrictions.
3. *The means.* An intermediary person who was not affected by the restrictions and in whom confidence was reposed by the testator or the transferor: the Roman *fiduciarius,* the English *feoffee* or *trustee.*
4. *The procedure.* A transfer of property made to the intermediary: by will or testament in the case of the Roman *fideicommissum;* by an act *inter vivos* or by will in the case of the trust.
5. *The charge.* A request made to or an obligation imposed on the intermediary to give to the property transferred to him the destination or disposition indicated by the testator or transferor.
6. *The subject.* A person for whose benefit the intermediary received, preserved, administered, disposed of or turned over the property transferred to him: the Roman *fideicommissarius* and the English *cestui que trust.*

Substantially, therefore, the *fideicommissum* and the trust were originated by similar causes, aimed at similar purposes and employed similar methods. The problem was to lay down in the civil law rules by which the trust system could be made to operate with the same beneficial effects obtained in countries under the common law. For these reasons the term *fideicomiso* has been adopted, to render in Spanish the term *trust.*

Naturally, the first legislative requirement was to give a definition of the new institution. For that purpose it was useless to attempt a definition based upon common law conceptions, techniques and terminology. Many definitions have been given both of the Roman *fideicommissum* and of the English trust. But comparing all of them we can easily see that in one or the other case they all coincide in an essential element: the Roman *fiduciarius* as well as the English *trustee* is a person charged with the execution of a mission conferred by another person for the benefit of a third person.

In the ancient *fideicommissum* the *fiduciarius* was enabled to fulfil his mission by his institution as heir. In the Anglo-Saxon trust, the same purpose is attained by giving the trustee the legal ownership of the property. Consequently, if both in the *fideicommissum* and in the trust the *fiduciarius* or the trustee carries out a mission of the testator or of the settlor, and if in civil law *mandate* is a contract whereby a person charges another with the execution of an act or the administration of property, there can be no doubt that mandate is the civil institution most akin to the trust, and that the trust may be assimilated to a mandate in which the settlor is the principal and the trustee is the attorney.

[1] EL FIDEICOMISO, estudio sobre la necesidad y conveniencia de introducir a la legislacion de los pueblos latinos una institucion civil nueva, analoga al trust del derecho inglés. Panama, 1919.

[2] This law was subsequently re-enacted with slight modifications, as Law No. 17 of 1941.

Now, is the concept of mandate sufficient by itself to characterize the trust? Assuredly not, because if that were the case a mandate would be the equivalent of a trust. It is not such an equivalent. Here are the reasons.

A mandate terminates with the death of the principal, and, moreover, may be revoked by him at any time. This is enough to demonstrate that the mandate of the Civil Codes does not respond to those necessities which can only be satisfied by the trust. It is of the essence of the trust that it should be irrevocable, as in the case of donations. It is true that the common law recognizes the existence or the possibility of a revocable trust; but according to the logic of the Latin spirit, there is no necessity for revocable trusts in the Civil Law, inasmuch as the purposes thereof could be attained by means of a mandate. On the other hand, a trust cannot be the object of a revocation after it has engendered acquired rights. The civilian considers that in principle the trust cannot be revoked by the will of the settlor alone, and that the trust can only terminate in cases expressly set forth by the law. When the settlor reserves for himself the right to revoke the trust, he takes away from the trustee the independence and the freedom of action the latter needs for the proper fulfilment of his mission.

This being so, if one considers that mandate is the civil institution most similar to the trust, but that on the other hand mandate is inefficacious as such, by reason of its revocability, how could the Latin spirit represent to itself the Anglo-Saxon institution? It could only be under the antithetical and somewhat contradictory form of an *irrevocable mandate,* whereby the settlor definitely gives away the ownership of the property he transfers to the trustee.

This fiction or conception, which has been criticized by several writers, was adopted for pragmatic reasons only. It is of no importance, of course, whether we call the trust an " irrevocable mandate," a " contract " or an " act ". What is essential is that in the civil law the function or operation of the trust and its legal effects be clearly described. Such an essential requirement is complied with in the definition contained in the model trust law to be discussed at the next meeting of the Inter-American Bar Federation, at Montevideo, Uruguay. To avoid confusion and misunderstandings, the word " act " has been substituted for " irrevocable mandate " and the definition reads as follows:

" A *fideicomiso* (trust) is an act whereby certain property is transferred to a person named *fiduciario* (trustee), for the purpose that he administer or dispose of it as ordered by the person making the transfer, named *fideicomitente* (settlor), for the benefit of a third person named *fideicomisario* (beneficiary).

The *fideicomitente* (settlor) may also institute the *fideicomiso* for the benefit of himself."

This definition contains the three elements which are essential to the trust contract, namely:

1. The transfer of the property;
2. The conditions in which the property is to be administered or disposed of;
3. The resulting benefit.

The definition also mentions the function and character of the three persons entering in the trust, namely: 1, the settlor; 2, the trustee; 3, the beneficiary.

The definition, moreover, agrees with the Anglo-American conception. Gilbert T. Stephenson in his " Origin and Development of the Trust " says:

> " A trust is nothing but an act by means of which a person transfers property to another, to be administered for the benefit of a third party."

Likewise, article 5 of the Louisiana Trust Estates Act reads as follows:

> " A trust is established when a person in conformity with this law, transfers the ownership title on certain properties in trust to a trustee for his own benefit or that of a third party."

It will be noted that the second paragraph of the proposed definition provides that the settlor may also institute the trust in favor of himself. This paragraph is not found in the Panama law, but is not really necessary, for as a matter of

fact, notwithstanding the absence of this explicit provision, trusts have been established in Panama for the benefit of the settlor himself.

On this basis the Panama statute goes on to regulate the novel institution. It covers the field of trust relationships and operations in thirty-eight articles. This might seem a very small number of provisions to the average common lawyer. The Restatement of the Law of Trusts drafted by the American Law Institute contains a much greater number of sections. Yet, I believe that all possible situations are foreseen and covered in the Panama statute. The reason is that in the civil law system, the law does not attempt to regulate the different cases or situations in great detail. A general principle is set forth and that general principle is applied in the numberless concrete cases that may arise. As an illustration I may cite the fact that the Panama trust act does not specifically mention voting trusts: these are dealt with in the corporation law. But even if there were no such provision in the corporation law, voting trusts would be covered by one single word of the trust law, the word " incorporeal ".

Article 2 of the law provides that *fideicommissa* may be instituted in all kinds of property, real or personal, corporeal or incorporeal, present or future. By *incorporeal* property the civil law means rights, powers, actions possessed, enjoyed or exercised by a given person. The right to vote as shareholder of a stock company is incorporeal property. That right may be transferred to a trustee. There is the voting trust. Details are left to the trust instrument.

The thirty-eight articles of the Panama law cover: the different kinds of *fideicommissa* or trusts; ways of creating them and their effects; registration of real property transferred in trust; rights, functions and obligations of the trustee; rights of the beneficiary; how and why a trust can come to an end; and, finally, effects of its termination.

The conception of the trust property and of the ownership of the trustee in the Panama Trust Law is different from that of the common law, but the effects of the two conceptions are the same.

The first thing that strikes the mentality of the civil lawyer in studying the trust as conceived by the common law is that it involves a double conception of ownership, by means of which the trustee is the " legal owner " while the beneficiary has what is known as the " equitable title ". In other words, in the same property there is recognized a theoretical or conventional right of the trustee and a real and effective right of the beneficiary. The Latin mind instinctively rejects this sort of dichotomy of ownership and is unable to understand Salmond when he states that trust property is one that two persons have at the same time.

Consequently, in order to attain the purposes of the trust in a civil law system, it is indispensable to make the trustee a regular and real owner, vested with the capacity to enjoy and exercise all the powers and attributes inherent in the right of ownership. By so doing, the Panama Law acts in the same manner as the Romans, who named a regular heir for the purpose of the *fideicommissum*.

But this ownership is not absolute. The *fiduciario* or trustee is bound to administer, to preserve or to turn over the property, according to the terms of the *fideicommissum*. In short, the trust property in modern civil law is, in substance, the *fiduciary property* of which mention is made in the Institutes of Justinian and in the Bello Codes. As stated by Vélez, a Colombian commentator of the Civil Code, " the *fiduciario* (trustee) is a true owner of the trust property, but he is obliged to preserve it so as to be able eventually to effect restitution."

This limitation of the fiduciary property is quite conformable to the spirit and the tradition of the civil law. In the Latin legal system we cannot conceive ownership as real in one individual and fictitious in another. But we conceive *dominium* (the right of ownership) as a sheaf of attributes, effects and manifestations which may be disseminated among diverse persons, as in the case of usufruct or servitudes, or in the case of certain contracts creating rights *in rem* such as pledge, mortgage, *antichresis*, lease, *commodatum* or *emphyteusis*. In the latter contract a remarkable distinction is made between the *dominio directo*

of the grantor and the *dominio útil* of the grantee. In all of these cases, the right of the owner in fee is limited by the right acquired by a third party under the terms of the respective contract.

In an identical manner the ownership of the *fiduciario* or trustee is limited by the rights of the beneficiary and by the provisions, rules and conditions of the *fideicomiso*. In this form, the English trust has been easily and successfully grafted on to the civil law.

With regard to the development of trusts in civil law countries, reference may be made to the following facts. The Panama Trust Law was the basis of the Mexican law enacted in 1926. The Mexican law, however, restricted the field of action of the Panama law by not allowing natural persons to be trustees and by making the *fideicommissum* exclusively a banking operation, in which only specially authorized banks can act as trustees. The 1926 law was superseded by a subsequent law enacted in 1932.

In 1928 a trust law was also enacted by the legislature of Puerto Rico, which adopted the Panama law in its entirety, with only such modifications as were necessary on account of differences in local administration and terminology. A Puerto Rican lawyer has told the story of how it came to happen. He was being troubled with problems that could not be solved under the civil code in force, which is still the Spanish Code of 1889. The problem could only be solved by means of a common law trust, and, of course, he concluded that such a trust was a legal impossibility. One day he glanced over an article I had published in the Bulletin of the Panamerican Union, having as an annex the text of the Panama law, and immediately he said—" This is exactly what we need in Puerto Rico." He had the bill introduced in the legislature, which promptly converted it into a statute. The law has proved to be fully effective and a considerable number of trust operations, involving large sums of money, have been carried out with complete success.

In Panama we have also begun to create trusts which have proved entirely successful. Indeed, our experience is that anything that can be done by trust in the Anglo-Saxon countries is feasible in civil law countries by application of the provisions of the Panama Trust Law.

The trust operates in ten civil law countries. In three of them, namely, the Province of Quebec, Scotland and the Union of South Africa, it works by virtue of broad interpretations given by the Courts to the effect of trusts, which are assimilated to the civil institutions of mandate and deposit. In four other countries, to wit: Louisiana, China, Japan and the Principality of Liechtenstein, special laws drafted on the Anglo-Saxon model permit the establishment of trusts. The remaining three have enacted laws which fully regulate the trust system in conformity with a conception and a terminology which are purely civilian. These three countries, as stated in the preceding pages, are the Republic of Panama, Mexico and Puerto Rico.

In other countries of Latin America laws have been enacted which do not completely regulate the trust institution, but show a tendency to adopt the fundamental traits of the trust. These countries are: Argentina and Brazil, where the so called " leyes de debentures " (debenture laws) regulate the issue of public loans through the intermediary of a trustee; Colombia, Chile, Ecuador, Peru, Bolivia, El Salvador and Costa Rica, where banking laws allow the so called " comisiones de confianza," which in fact are administration trusts, in which the bank acts as a trustee but the trust is subject to revocation by the settlor. The movement in favor of this legislation was started on the occasion of the mission fulfilled by the noted American economist, Edwin Kemmerer, in several Latin-American Republics. Kemmerer's idea was to familiarize the public of those countries with American practices regarding the administration of trusts by the banks, but he made no attempt to have real trust laws enacted for the purpose. The movement, however, shows that the problem is today one which concerns several countries living under Roman law.

It may be averred that the grafting of the Anglo-Saxon trust on to the civil law, under the denomination of *fideicomiso*, as a modern, living, flexible and fruitful modality of the old and fossil Roman institution, has already passed the stage of experimentation. The trust lives within the civil law and it represents a triumph of the modern spirit over routine in the realm of jurisprudence.

THE GERMAN TRUST*

[*Contributed by* PROFESSOR DR. HANS WÜRDINGER, *Hamburg.*]

(1) The development of the trust in English law from Feoffee to uses to the modern "trust," one of the most important achievements of Equity, arouses marked interest and admiration among German lawyers. In the first place they regard the legal principles governing the English law of "trusts"—whether rightly or wrongly is not a matter for discussion here—as the development of legal ideas which also operated in Germany before the Reception of Roman law; and further they praise the freedom from juristic abstractions characteristic of Anglo-American legal culture, which thinks of legal rules in relation rather to their results than to their theoretical nature, and prefers a supple, elastic application of law to the logic of a closed legal system. There has therefore been no lack of attempts on the part of German jurists to take over English notions connected with the "trust" into the German legal system. Such attempts have however foundered on the legal premisses which govern our legal thought. Since the Reception of Roman law German law has been dominated by the contrast amounting to a distinction between logical categories between obligations and real rights, i.e., between rights *in personam* and rights *in rem*. An obligation is a relation between creditor and debtor, entitling the former to demand a performance from the latter, such as the delivery of a thing, the payment of money, an act or an abstention (§241 BGB).. If the obligation is to deliver a thing, the obligation itself gives the creditor no *real* right to the thing; he acquires it only if the debtor in fulfilment of his obligation conveys the thing to the creditor (e.g., the buyer), and for this a separate *real* transaction is required (§929 ff. BGB). Accordingly, if the debtor in breach of contract conveys the thing to a third party, the creditor cannot claim delivery of the thing from the third party, but acquires only a right to claim damages from the debtor for breach of contract. A real right, on the other hand, such as ownership or that arising from a pledge, affords the person entitled to it a possibility of exercising control over the thing. It is not directed against a specific person, but subjects the thing to the unlimited or limited control of the person entitled, though this is protected against intrusions of third parties by a claim to an injunction and, if the third party is at fault, by a claim for damages. Whereas a contract may give rise to rights and duties of every conceivable kind, German law admits only a limited number of real rights and transactions appertaining to the law of property. Accordingly only where enacted law expressly so provides can real rights be added to or modified by contract or by judicial interpretation. Thus §137 BGB makes it impossible for a trustee who holds trust property to be applied for the benefit of the settlor, to have the full power inherent in his ownership restricted by contract in such a way that the restriction may have real effect. On the contrary, the trustee has vested in him the unrestricted and exclusive ownership with its inherent illimitable power of disposition. If he is to exercise this power of disposition only in a specified way, this is to say for the benefit of the settlor, that can be secured only by a contract, by which the trustee is obliged to make no use of the excess of power inherent in his ownership and to use his owner-

* Translator's Note :—The German word *Treuhand* has been translated *trust*, though the reader will see that it is by no means an exact equivalent. The German word *Trust*, which everywhere refers to the English or American institution, is translated "*trust*." The words *settlor* and *trustee* are likewise not exact equivalents for the German *Treugeber* and *Treuhander*, but have been used for convenience.

ship for the benefit of the settlor. If the trustee breaks his obligation and, for example, alienates the trust property to a third party in breach of contract, the third party acquires full ownership and the settlor can only recover damages for breach of contract against the defaulting trustee; but he cannot claim the return of the property from the third party. The only exception is when the third party acts *dolo*; for he and the trustee then commit a joint tort and the injured settlor can claim return of the thing from the third person by way of compensation for his tortious and immoral conduct. This is however a rare case.

For the foregoing reasons the idea that an equitable ownership can subsist in the settlor side by side with the legal ownership of the trustee is alien to German law. The German view is that in a trust pure and simple, although the trustee is formally unrestricted in his ownership, from the business point of view the settlor must be regarded as owner. This does not however imply that the settlor also has *de jure* ownership (equitable ownership). The position is rather that the settlor, although he is not owner, has attributed to him in certain cases on grounds of justice and equity, the remedies which the law would have afforded him had he been legal owner. This produces in effect a considerable similarity between German and English law, and it must be emphasised that this development has been favoured by the pattern afforded by the English " trust." The assimilation is however not complete, as may be seen from the following discussion.

(2) The trust must be considered in its relation to the distinction between personal and real rights. The personal aspect may first be noted. The Civil Code (BGB) regulates in its second book, under the title " Particular Obligations," various types of contracts, but does not mention the trust as a special type of contract. The Reichsgericht has therefore said in a decision reported in vol. 127 p. 345: " There is no typical trust contract; the content of the legal relation must be determined in accordance with the surrounding circumstances, and in particular the mandate upon which it is based. The Reichsgericht has already declared it fruitless to classify a contract as a trust contract and to try to decide a case upon that footing (Leipz. Zeitschr. 1913 S. 395)."

In answering the question which type of contract regulated in the Civil Code should be used to elucidate the so-called disinterested trust, where the trustee has to administer the property vested in him for the benefit of the settlor, the following point must be borne in mind. The contracts regulated in the Code may be exhaustively divided into three contrasted groups. The first group comprises the contracts in which the parties face each other at arms length, inasmuch as the economic advantage which each party strives for is necessarily at the expense of the other party. This occurs in all transactions which are directed towards the exchange of reciprocal performances (*do ut des*), for instance in sale, the lease of houses or land, work and labour, etc. The second group comprises the contracts in which the parties pool their interests, inasmuch as they strive for a specified result in common; this is true of partnership contracts. The third group is characterised by the obligation that the one party takes upon himself to attend to the interests of the other party, inasmuch as he subordinates his own interests to those of the other party. It is concerned with the protection of interests, which, if it leads to gratuitous activity is called mandate (§662 ff. BGB), and when it is for a consideration, is called business agency (*Geschäftsbesorgung*, §675 BGB). To this group belong also the contracts which can give rise to a disinterested trust, in accordance with which the trustee must administer the property transferred to him for the benefit of the settlor. It includes however many other situations which have nothing in particular to do with the trust. Thus among business agents are commission agents, forwarding agents, business representatives, solicitors, and architects who give orders to firms of builders on the owner's account. Business agency also occurs where instructions are given by a customer to a bank to collect on a cheque, or where a doctor assigns to a debt-collecting agency his claim for fees, or again where a bank which has become custodian of securities, especially

shares, exercises voting rights on its customers' behalf, collects dividends and gives effect to other shareholders' rights. In all these cases the agent acts for the benefit of the principal and on his account, as is also the case with the trust; yet these contracts are not trusts in the technical sense of the term. Rights and duties arising out of mandate can also be created by statute, as for instance in the case of a testamentary executor (§2218 BGB); or of the board of an association (§27 s. 3 BGB) or of a joint stock company; and likewise of the managing partners in a partnership (§ BGB 713).

The essential rights and duties arising from such a relation are the following:

The primary duty of the agent is to protect the interests of the person for whose benefit he acts. That can be either the principal himself or a third party. The specific tasks appertaining to that duty are determined by the circumstances of the particular case. In principle the agent is also bound to comply with the instructions of the principal. He must therefore give information and present accounts and he must also hand over to the principal anything which he acquires in the execution of the mandate. He can however claim compensation for expenses; and here certain distinctions appear according as the agency is gratuitous or otherwise.

In the period after the second world war many special trusts have been created in West Germany by ordinance of the Military Governments. Managing custodians were placed in charge of many public and private properties or undertakings, whose legal position was not regulated in detail and who have occasioned many doubts of a legal kind. The custodian is to be regarded as an official person and he administers the property or undertaking the disposal of which had been withdrawn from the owner by sequestration, as agent and for the account of the person in whom this sequestrated property is ultimately to vest. This may be the old owner himself, but it can also be a third person who is to receive the property (for example, the Federal Republic, the Länder, persons entitled to restitution, etc.), whose place Property Control have taken for the time being. The above mentioned personal rights and duties apply in principle to these custodians in relation to Property Control or its successors in title. In some of the Länder the legal position of the custodians has in the meantime been regulated by statute; e.g., in Bavaria by an Act of 19.6.47, in Württemberg-Baden by an Act of 4.3.48.

The result of the foregoing discussion is that as far as the obligatory relation is concerned, whether it rests on contract or on statutes, there is nothing peculiar in the trust, that the trust contract does not exist as a special contract type, but that cases of trust are in general assimilated to mandate and business agency, both of which however have a much wider sphere of application than the trust.

(3) However, just as in English law the trust, through the development of equitable ownership, has passed into the law of property, so in Germany also the courts have drawn certain conclusions on grounds of justice and equity, from the fact that the trustee is only formally owner whereas from the business point of view the ownership is attributed to the settlor. They operate, however, in a much narrower field than the equitable ownership of English law.

For the purpose of these principles a person is a trustee who has acquired the ownership in property rights from another person, the settlor, and is to exercise these rights in his own name but not for his own benefit. Since the ownership which the trustee formally acquires implies an inseparable and unlimited power of disposition, the trustee acquires as owner the legal power of disposing of the trust property at will (§903 BGB). This legal power, which is of a *real* nature, cannot be withdrawn from him, that is to say the content of the ownership cannot be restricted or divided. Thus the legal power vested in the trustee extends farther than is required by the purpose for which the ownership was transferred. Accordingly the trustee is placed under an obligation to deal with the ownership only so far as corresponds to the purpose of the transfer, that is to say to apply the trust property for the benefit of the settlor. Thus the obliga-

tion provides a counterpoise to the excess of legal power in the trustee. This obligation need not be specially stipulafed for. It is implied in the special nature of the situation and is to be inferred automatically from a consideration of the circumstances and of the purpose for which ownership was transferred to the trustee, just as happens in English law with the resulting " trust ".

(a) Since the trustee is only bound personally, a disposition which the trustee makes of the trust property in breach of contract would not be legally inoperative. The settlor could not make good any legal claim against the third party (there is an exception only in the case where the third party acts *dolo*; cf. Reichsgerichtsentscheidung Vol. 153 p. 370); his remedy is restricted to a claim for damages against the trustee for breach of contract. This applies both to " disinterested " and to " interested " trusts, the distinction between which is discussed later under (4). If for example a debtor conveys stock in trade to his creditor by way of security, i.e., to secure his debt (a so-called " interested " trust), the creditor acquires it only for the purpose of securing his claim. He must therefore not dispose of it, but must reconvey it if the debtor discharges his debt. This duty need not be specially agreed upon; it follows *ipso iure* from the purpose of the security conveyance. A right of disposal would arise in favour of the creditor only if the debtor does not pay his debt. If however the creditor alienates the stock in trade to a third party in breach of contract or burdens it with a pledge in favour of a creditor of his own, the debtor can have no remedy against the third party, but is limited to his claim against his creditor. That would hold even if the trustee alienates the trust property to a third person gratuitously. The settlor could not have a claim under §816 BGB against the third party; for that provision refers only to cases where someone disposes of another's property, e.g., where a borrower alienates a thing he has borrowed or a lessee a thing leased to him, in which case the third party would acquire ownership according to the rules for the protection of good faith contained in §932 BGB. The trustee however disposes of the property not as a non-owner, but as true owner, so that §816 is not applicable. In this connection therefore no special consequence is drawn from the fact that there is a trust.

(b) Moreover according to German law no " real subrogation " takes place in such cases, as it does in English law, where the proceeds of a sale of trust property become trust property in their turn. Real subrogation is the process by which an object which is acquired in return for property belonging to a separate estate *ipso iure* becomes a part of the separate estate. Our legislation knows subrogation only in specified individual cases, e.g., in the law of matrimonial régimes or infants' property, and in the law of succession. It does not apply to trust property, for the law has enumerated exhaustively the cases of subrogation and in the realm of property law the exclusive character, already mentioned, of the rules of law precludes any analogical extension by the judge. If therefore the trustee in breach of contract disposes of trust property and acquires other objects as " equivalents " for it, the provision for the protection of the settlor which is described under (4) has no reference to these substitute objects, since the settlor is not regarded from the business point of view as acquiring ownership of this newly acquired property. The settlor has of course in all these cases a claim for damages. Moreover the trustee incurs criminal liability. But these legal effects provide the settlor no protection where the trustee becomes bankrupt or a creditor of the trustee levies execution on this newly acquired "equivalent ".

Some authors (e.g. Siebert, *Das rechtsgeschäftliche Treuhandverhältnis*, Marburg 1933, p. 185) propound the view that subrogation must be recognised at least in so far as the trust property receives compensation for damage or destruction done to it (e.g., by way of insurance). However, here also the prevailing doctrine rejects subrogation and the leading case decided by the Reichsgericht is the decision of 19.2.1937, Vol. 153, p. 370, in which the court says: " The rule of real substitution (subrogation) applicable to various legal

relations does not apply generally (cf. RGZ, Vol. 94, p. 305). To admit it in the application of §771 ZPO (cf. 4a below) to cases of the kind coming up here for decision must moreover necessarily bring the law into extreme uncertainty."

The Reichsgericht has expressed the same opinion where a trustee has made a disposition of the trust property with the consent of the settlor. In the Reichsgericht decision Vol. 133, p. 84, the facts were as follows:

A wished to afford C credit, but not to appear himself as lender. Accordingly A transferred the money to B with the instruction that B should lend C the money in his own name. C created a hypothec for it in B's favour, which was registered in B's name. When B subsequently became bankrupt and A laid claim to the hypothec as his, A's claim to have it severed from the general mass of B's assets was rejected by the court on the ground that the hypothec could no longer be regarded as trust property. On this point the Reichsgericht said:

"According to the settled case law of the Reichsgericht there can be no question of a trust in the legal sense of the term except in cases where one party, the settlor, has entrusted to another person, the trustee, an object hitherto belonging to his estate even in the legal sense of the term, that is to say, has alienated it with the provision that while the other shall exercise the right transferred to him in his own name, he is not to be allowed to use it for his own advantage, for only in such a case can it be said that although the trust property has been legally separated it has not in a business sense been separated from the estate of the settlor. On the contrary, trust is excluded if one person in the character of undisclosed agent has acquired an object for another person on his account and for his benefit from a third party and as a result of this agency the other person only acquires a personal right against the agent to have the object transferred to him."

The same rule has also been enunciated in earlier decisions; cf. RG., Vol. 84, p. 217, Vol. 91, p. 16, Vol. 127, p. 344.

Although jurists have condemned this view of the Reichsgericht as too narrow, the courts have adhered to it without exception. It follows that the acquisition of ownership for an undisclosed principal through an agent, although it takes place for the benefit and on account of the principal, is never regarded as trust property and that the principal is not protected if the agent goes bankrupt and a creditor of the agent levies execution on it.

The same rule applies especially to the commission agent, for whom a special provision introduces an exceptional rule of very limited scope. According to §392, s.2 HGB, claims of a commission agent against third parties count as between the principal and the agent or his creditors as claims of the principal. This difficult provision has the following meaning: If a commission agent sells property belonging to his principal, the claim against the third party for the price belongs to the agent, since he acted in his own name. The same applies also to the claim for delivery of the goods, if a commission agent has contracted to buy goods from a third party. The agent is bound to assign this claim to the principal; but if unassigned, the claim belongs to the estate of the agent. If, however, a creditor of the agent garnishes this claim, then the principal can at once object; he can likewise sever the claim from the bankrupt estate, if the agent goes bankrupt. This rule of §392, s.2 HGB, applies however only to claims which arise out of transactions of the commission agent with third parties. It does not apply if the third party in performance of his obligation pays the price or delivers the goods to the commission agent and the latter thereby becomes owner of the money or the goods. If he then goes bankrupt, the principal can no longer sever; nor could he object if a creditor of the agent garnishes the debt. The protection of the principal is therefore very narrowly limited and the question arises why the law is satisfied with it. Here too the reason is that uncertainty might easily arise just as it is to be feared from the admission of real subrogation. Accordingly both the jurists and the courts have tried to find another way of affording wider protection to the principal. This has been achieved with the help

of the doctrine of " alienation to whom it may concern," which means that although the commission agent acts in his own name, the ownership of the property bought by him for the principal passes immediately to the principal with the delivery to the agent. However a more detailed discussion of this principle would take us too far.

To sum up, anything acquired through an agent, even if it is acquired in return for trust property, does not become trust property and to that extent any special legal protection is denied to the settlor.

Here again however rules of the law of obligations come into play which are derived from interpretation. If a trustee, whether permissibly or in breach of contract, alienates trust property for value or obtains credit by pledging it, he is bound to treat the " equivalent " or the credit which he has obtained by the transaction as trust property in its turn and to hand it over to the settlor or deal with it according to his instructions (cf. RG. in Leipz. Zeitschr, 28, 1248). This case resembles the constructive trusts of English law but differs from them in its legal effect.

(4) The special protection developed for the settlor by German law which must now be described relates therefore only to trust property which has been transferred directly by the settlor to the trustee. Moreover it is found only in connection with the so-called disinterested trust. This is the case where the trustee has to administer the property transferred to him exclusively for the benefit of another person. Disinterested trusts occur for example where an undertaking is placed under trust administration or an estate is transferred to a trustee to be realised for the benefit of the mass of creditors. On the other hand an " interested " trust occurs when the transfer of an object to a trustee serves the interests of the trustee himself but the legal effect extends beyond the purpose of the transfer and beyond the sphere of the trustee's own interest; this is especially the case with alienation by way of security (cf. 5 below). The protection must first be described which has been developed for the case where the creditors of the trustee of a disinterested trust levy execution and for the case where the trustee goes bankrupt.

(a) The Civil Procedure Ordinance (ZPO) contains in §771 an important provision dealing with the case where a creditor levies execution against a debtor upon an object over which a third person has a right which operates as a restraint on alienation. The typical situations to which this provision applies are the following: In levying an execution against a debtor an object is attached which the debtor has borrowed from a third party, the ownership of the object being therefore not in the debtor but in the lender. It is the same if furniture is attached which the debtor has bought by instalments and in which the seller has reserved the ownership until the residue of the price has been paid. Here also the owner at the time when the furniture is attached is the seller and not the debtor on whose estate execution is being levied. In such cases therefore property is attached which is found in the debtor's possession but which is owned by a third party. In these cases §771 ZPO provides that the owner can raise the so-called "complaint by way of objection," which has the effect of removing the attachment. The courts also apply this provision in favour of a settlor if a creditor of the trustee levies execution on trust property. The legal position here is of course essentially different from that in the above-mentioned cases. The trustee against whom the attachment is directed is here the true owner of the trust property. Nevertheless because he has received the object from the settlor with directions to apply it exclusively for the benefit of the settlor, so that from a business point of view the settlor appears as the person really entitled, the settlor is allowed to raise the objection. The Reichsgericht, it must be admitted, does not proceed upon a hypothesis of equitable ownership, but says that the settlor has a contractual right against the trustee and that this right is one to which §771 ZPO can be made to apply on grounds of justice and equity.

(b) A similar rule applies where the trustee becomes bankrupt. When the

estate of a debtor is brought into bankruptcy the entire existing estate which can be attached is withdrawn from the disposal of the debtor and placed at the disposal of the liquidator, who has to realise it in order to satisfy the creditors. If now the liquidator claims an object which is in the debtor's possession but does not belong to his estate because it is owned by a third party, the owner can " sever " this object as not belonging to the bankrupt estate (KO 43). This right to sever is also allowed to a settlor over trust property which the trustee has acquired directly from the settlor upon a disinterested trust.

The above mentioned rules are settled law and are actually described as customary law.

(5) The position is different in an interested trust, in which the transfer of the object serves the interests of the trustee but his property right extends beyond what is required by the purpose of the transaction, as in an alienation by way of security. The creditor to whom a debtor transfers stock in trade by way of security becomes owner of the goods and acquires the unlimited power of disposal which is inherent in ownership. He must not however exercise his right of ownership unless and until it is established that the debtor will not pay. To that extent the creditor is contractually bound. In these circumstances the courts refuse protection to the debtor against the creditors of his creditor so long as the latter's right subsists. If however the debtor extinguishes the right by payment, the trust which was hitherto interested is transformed into a disinterested trust, so that henceforth the above mentioned rules come into play.

(6) The question still remains to be discussed in what legal relation the settlor's creditors stand towards the trust property of which the ownership is vested in the trustee. Here also a distinction must be made between disinterested and interested trusts.

(a) Whenever the property transferred to the trustee is found in the trustee's possession, as almost always occurs in disinterested trusts, an execution which a creditor of the settlor levies on his estate will not in practice touch this trust property. It is however possible that such trust property may also be found in the settlor's possession, e.g., if the settlor alienates his undertaking to a trustee so that the latter may manage it for him but a motor car belonging to it remains in the settlor's garage or stock in trade is found in the space which serves as the settlor's residence. If then a creditor of the settlor attaches the car or the goods, then according to the wording of §771 ZPO the trustee, since he is formally owner of them, would be entitled to object. Nevertheless he is not accorded this right, since in a disinterested trust the alienation is not for the benefit of the trustee and accordingly the latter cannot invoke an interest worthy of protection when exercising his claim to object. Here also the trust property is treated as though it still remained the property of the settlor.

The same rule applies if the settlor goes bankrupt and the liquidator lays claim to objects which have been alienated to the trustee. Here also in spite of his ownership the trustee is not entitled to claim severance of these objects because in a disinterested trust he has no interest in them worthy of protection.

(b) The situation is different where the trust is interested, e.g., where there is an alienation by way of security. Here the alienated property remains as a rule in the possession of the debtor who has alienated it. Alienations by way of security are preferred to pledge precisely because in pledge (in so far as no negotiable document of title is executed to cover the property) the property would also have to be placed in the possession of the creditor, whereas in an out and out alienation by way of security the possession remains with the debtor and his business suffers no disturbance. It is therefore particularly common to find a creditor of the debtor levying execution on the alienated stock in trade. The secured creditor's ownership is then upheld until such time as his debt is extinguished: he can invoke his ownership in opposition to unsecured creditors of his debtor and can resist execution upon it by objecting under §771 ZPO (cf. 4a above).

The position is rather different where the settlor goes bankrupt. Formally the secured creditor would be able in virtue of his ownership to demand severance of the stock in trade transferred to him. He is however not allowed so far-reaching a right: he is treated rather as if a pledge had been executed in his favour, since from a business point of view his ownership, like a pledge, serves only the purpose of security. Accordingly the creditor can, like a pledgee, satisfy himself out of the property alienated to him in preference to the unsecured creditors; any excess, however, must be returned to the bankrupt estate and to that extent the creditor cannot have recourse to the more far-reaching right which he formally enjoys; the leading decision may be found in RG. Vol. 124, p. 75.

These principles show the way in which the courts take into account the fact that in all these cases the formal right and the interest worthy of legal protection are in different persons, reason and equity demanding that regard should be paid to business interests. But difficulties can arise where the interests of several parties are at stake, where for instance a debtor transfers his estate in trust to a trustee who is to administer it and as far as necessary to realise it in his own name in favour of the creditors. Here the trustee is trustee both for the settlor and for the settlor's creditors, the interests of the creditors being opposed to those of the settlor. All the creditors who have agreed to the transfer of the estate to the trustee must here abstain from individual execution. According to the view taken by the jurists this ought also to operate against the creditors who have not agreed. So far, however, the courts have refused to apply the rules for interested trusts against such creditors; cf. Kammergericht in JW. 1933, p. 132. The Reichsgericht has not yet decided the point.

(7) It has been explained under (3) above that a settlor enjoys inadequate protection against a trustee's dealings with trust property in breach of contract, since he is limited to a claim for damages against the trustee and since moreover the " equivalent " which the dishonest trustee acquires in return for the trust property he has alienated is not assimilated to the trust property, the settlor being limited here also to a claim in contract. The danger involved in this situation can be excluded in part.

In so far as the trust property which is transferred to the trustee consists of movable things the ownership can be transferred subject to the resolutive condition that it shall automatically revest in the settlor, not only upon the termination of the trust, but also in case the trustee should dispose of the trust property in breach of his duty (cf. Kammergericht in OLG. 22, 388). Such a resolutive condition can however only be attached to a conveyance of movables; it is excluded in the case of land, because the imposition of a condition is incompatible with a conveyance of land (§925, s.2, BGB). It is even conceivable, where moveables are concerned, that the intention of the parties to make the alienation in trust operate subject to such a resolutive condition may be inferred from the surrounding circumstances. Admittedly the protection which is thus implied in favour of the settlor is imperfect. Of course if the trustee alienated the trust property in breach of contract the ownership would automatically revest in the settlor. But the rules for the protection of good faith would intervene in favour of the third party who acquires the property (§161, s.3, and §932 ff., BGB), making the third party none the less owner provided he does not know of this circumstance and his ignorance is not due to gross carelessness. In this case also the settlor is limited under §816 BGB to a claim *in personam* against the trustee by which he can demand the consideration obtained for the conveyance and damages in addition. Only where the trust property has not been alienated for value, e.g., by way of gift, could the settlor claim the return of the thing from the third party.

With movables it is also possible to introduce the following contractual substitute for subrogation. The same term is agreed on by which property acquired by a commission agent can be made to pass into the ownership of the principal as soon as it is received by the commission agent, i.e., by a prospective

constitutum possessorium (§930 BGB). Should the trustee dispose of the trust property in his own name, the settlor and the trustee can agree in advance when the trust is established that the ownership in the "equivalent" obtained by the trustee shall vest in the settlor at the very moment when it is received by the trustee, the trustee having the property henceforth in his custody only as a depositee or administrator. Such an agreement is however only effectual if the property so obtained is sufficiently specific, so that no doubt can arise as to its identity.

Where land is alienated by way of trust, no conditional alienation is allowed. Nevertheless the settlor and the trustee can agree that if the trustee acts in breach of his duty the contract shall be discharged and the trustee shall be obliged to reconvey the land. This condition for reconveyance can be secured by entry in the Land Register when the trust is constituted (§883, 888 BGB). The security afforded here to the settlor is substantially stronger than where movables are concerned; for if the trustee disposes of the land contrary to his duty, the acquirer is not protected, since the legal position is evident from the Register. The disposition in his favour would be legally inoperative. However, such considerations lead us well into the sphere of contractual practice, which is not concerned with the fundamental questions to which this exposition must be confined.

Thus the settlor obtains the most effectual protection only if the trust is so constituted that the settlor remains owner of the trust property and merely gives the trustee authority to dispose of the trust property in his own name. This authority is regulated in §185 BGB. In this case the trustee acquires no real right at all, but only the possession of the trust property is transferred to him for the purpose of administration. In so far as the trustee has to make acquisitions by using the trust property, a prospective *constitutum possessorium* can vest in the settlor the ownership of objects subsequently acquired by the trustee. Dispositions undertaken by the trustee in excess of his authority to deal with the trust property would in principle be ineffectual. Here also, however, it may happen that a third party who is in good faith may acquire ownership, cf. §366 HGB. But here we are concerned with a general principle which does not provide special protection for settlors, but operates in countless other situations. If the trustee goes bankrupt, the settlor has automatically full right to sever; he can likewise object to any attempt on the part of the trustee's creditors to levy execution on the trust property.

(8) A few words must be added about the termination of the trust. The time of termination is fixed in the first instance by the contract. The parties have here full liberty to make whatever agreement they wish. Since the trust contract creates a continuing relation, the possibility arises of terminating it prematurely "for serious cause." This operates especially if the trustee acts contrary to his duty. The trustee is then bound to reconvey the trust property and anything that may have been substituted for it. Since the trust rests on personal confidence, it also terminates with the death of the trustee. The ownership of the trust property does not revest automatically—this could be agreed on only where it consists of movables. It passes to the heirs of the trustee, who are however bound to reconvey to the settlor.

(9) In very recent times the Investment Company has found its way into Germany. A company (e.g., a GmbH) obtains funds by the issue of certificates or bonds in the open capital market, in order to lay them out to advantage in shares of various kinds, the holders of the certificates or bonds participating in the dividends obtained. Such companies are no more to be regarded as trustees than a borrower whose creditor participates in the profit of a business which is carried on with the help of the loan. If the company goes bankrupt, the holders of the bonds are ordinary creditors. They cannot object to the creditors of the company levying execution on the interests held by the investment company. The investors could obtain protection only if the funds raised by the company in the capital market were legally constituted a so-called

collective estate of the investors, the investors themselves remaining joint owners of the funds, an arrangement which involves difficulties of another kind. The company is of course accountable to the investors, according to the general rule which makes the debtor accountable to his creditor in a participating loan. In this connection it must also be noted that the expression trustee or trust company is commonly used in business practice, sometimes even by the legislature itself, where there is no trust relation whatever in the legal sense explained above, and the courts have often had to concern themselves with the question whether the term trustee should be declared inadmissible in business, especially as part of a firm name, because of the danger of deceiving the public. In the absence of any statutory provision, there is a strong tendency to give far too wide an extension to the word trust as a purely business concept.

(10) The leading work on the trust, in which the entire case law and extensive literature are collected together, is: Wolfgang Siebert, *Das rechtsgeschäftliche Treuhandverhältnis,* Marburg 1933. Reference must also be made to Franz Beyerle, *Die Treuhand im Grundriss des deutschen Privatrechts,* 1932; Bovensiepen, *Treuhandgeschäft, Treuhänder und Treuhandgesellschaften,* im HdR. Bd. VI S.60; Ernst Cohn, *Das rechtsgeschäftliche Handeln für denjenigen, den es angeht,* Marburg 1931; Hugo Emmerich, *Die Sanierung,* I. Teil, Mannheim 1930; Alfred Friedmann, *Empfiehlt sich eine gesetzliche Regelung des Treuhandverhältnisses*? Gutachten für den 36.Deutschen Juristentag, Berlin 1930; Rudolf Goldschmidt, *Investment Trusts in Deutschland,* Mannheim 1932; Haemmerle , *Empfiehlt sich eine gesetzliche Regelung des Treuhandverhältnisses*? Gutachten für den 36.Deutschen Juristentag, Berlin 1930; Levy, *Die Stellung des Treuhänders,* Berlin 1930; Alfred Schultze, *Die langobardische Treuhand und ihre Umbildung zur Testamentsvollstreckung,* Breslau 1895; Jaeger, *Kommentar zur Konkursordnung* §43 Anm. 38 ff; *Palandt, Kommentar zum BGB,* Vorbemerkungen vor §164 und vor 929.

AUSTRALIAN COMMUNIST PARTY v. THE COMMONWEALTH[1]

[*Contributed by* PROFESSOR D. P. DERHAM.]

IN this case[2] the validity of the Communist Party Dissolution Act 1950 was challenged by the Australian Communist Party, and by a number of industrial Unions. The case is important with respect to a number of Constitutional problems. But it is most important with respect to principles of constitutional interpretation and the scope of the Commonwealth defence power.

The challenged Act worked in three main ways. It dissolved the Australian Communist Party and forfeited the Party's property (S. 4). It empowered the Governor-General (on the advice of a Committee appointed for the purpose) to declare unlawful any body or association of persons with Communist affiliations. The Governor-General was so empowered if he was satisfied that the Act applied to the body, etc., in question, and that the continued existence thereof was prejudicial to the defence of the Commonwealth and the maintenance of the Constitution. The effect of such a declaration was dissolution and forfeiture of property (Ss. 5-8).

Further, it empowered the Governor-General, if he was satisfied that a person was one to whom the Act applied, and that he was engaged or likely to engage in activities prejudicial to the security of the Commonwealth, provided the person was or had been within a specified period a Communist as defined in the Act, to make a declaration accordingly in respect of such a person (once again on the advice of a Committee). The effect of such a declaration was that the

[1] (1951) A.L.R. 129.

[2] I wish to acknowledge that, in sorting the mass of conflicting material involved in preparing a note on a case of this kind and for the final form of the note, I am greatly indebted to my colleague Professor Zelman Cowen for his assistance in a number of stimulating discussions on the case.

declared person was barred from appointment in the Commonwealth Public Service, or from office under any Commonwealth agency and also from holding office in any industrial organization which, in the Governor-General's opinion, was vital to the security of the Commonwealth (Ss. 9 & 10).

" Communist " was defined by the Act as meaning " A person who supports or advocates the objectives, policies, teachings, principles, or practices of Communism as expounded by Marx and Lenin." (Sec. 3).

Associations and individuals were given the right of appeal from declarations made but only on the question of whether or not the Act applied to them. The Act was expressed to continue in force until the Governor-General proclaimed that it was no longer necessary to the security of the Commonwealth.

The Act was given a lengthy Preamble which, in nine separate paragraphs, recited a number of supposedly relevant powers of the Commonwealth and a number of broad allegations against the Communist Party and Communists.

In brief, the Preamble did the following things. It set out the defence power of the Commonwealth, the executive power and the incidental power, as granted to the Commonwealth by Sections 51 (vi),[3] 61,[4] and 51 (xxxix)[5] respectively of the Constitution. It recited that the Australian Communist Party was part of a world force bent on violent revolution and which was in attack against established institutions of government in Australia. It asserted that the activities of the Party were disrupting certain industries vital to the defence of Australia, and that it was necessary to the defence of Australia that the Party and affiliated bodies be dissolved.

The case came before Dixon J. at first instance. The plaintiffs sought to adduce evidence to disprove the statements made in the Preamble. The defendant on the other hand did not seek to adduce evidence in support of those statements and at no stage of the case did the defendant move to do so. Dixon J. stated a case for the Full Court of the High Court. The preliminary issues for the decision of which the case was stated were: firstly whether the validity of the Act depended on the truth or untruth of the assertions set out in the Preamble, and secondly, whether or not the plaintiffs were entitled to adduce evidence denying those assertions. Those and other subsidiary issues apart, the broad ground of attack by the plaintiffs was that the Act could not be supported, so it was argued, under any power vested by the Constitution in the Commonwealth or under any combination of any powers so vested. The defendant sought to sustain the Act by reference to the defence power (S. 51 (vi)), the executive power (S. 61), and the incidental power (S. 51 (xxxix)) of the Commonwealth.

It was held (by Dixon, McTiernan, Williams, Webb, Fullagar, and Kitto, JJ.; Latham C.J. dissenting) that the Act was not within the powers of the Federal Parliament and was invalid. The opinions of Dixon, McTiernan, Williams, Fullagar, and Kitto JJ., each of whom delivered separate judgments, were in general harmony. Webb J.'s opinion depended upon different, and, in some instances, unconvincing reasoning. Of the majority, Dixon J.'s judgment may be taken as the leading judgment.

So far as the defence power was concerned, the whole Court followed the

[3] Section 51 (vi) reads : " The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :—

(vi). The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth."

[4] Section 61 reads :—" The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

[5] Section 51 (xxxix) reads :—" The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :— (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

interpretation which had been applied in numerous cases during the War, and expressed perhaps most succinctly by Dixon J. in *Stenhouse v. Colman*.[6] That interpretation, stemming directly from the approach of the majority of the High Court in *Farey v. Burvett*,[7] decided during the 1914-1918 war, accepts the notion that the defence power is purposive, i.e., that it is a power to achieve an end—the defence of Australia. The expressed idea is that, although the words used and the concept framed by them are constant, the means proper to the attaining of the end and therefore the content of the power, can and do vary with the changing exigencies of the time.

Ordinary interpretation of the operative parts of the Act led to a characterization of the Act as being with respect to the dissolution of voluntary associations and corporations, and the disqualification of persons from certain classes of employment. No express power is given to the Commonwealth with respect to those matters. The Act to be valid therefore, must have been with respect to a matter incidental to the execution of some Commonwealth granted power, or have been with respect to a subject matter which of itself provided a connection with the end to be achieved by the defence power.

So far as Section 4 was concerned, no connection with the defence power or with the implied power to safeguard the Governmental institutions of the Commonwealth could be seen, unless the assertions set out in the Preamble to the Act were accepted as conclusive. The connection between Sections 5 and 9 of the Act and the end to be achieved by the defence power was supplied partly by the Preamble and partly by the opinion of the Governor-General; an opinion held by the majority of the Court, on a proper construction of the relevant Sections, to be unexaminable. It was stressed that the assertions made in the Preamble, and the matters of which the Governor-General was to be satisfied under Sections 5 and 9, were described indefinitely (and in the main in the terms used by the Constitution itself); they did not express any specific factual connection with the defence power, nor refer to any specific subversive or hostile conduct. It followed, so far as Sections 5 and 9 were concerned, that conduct to which specific legislation could not have been directed, none the less could have been made the basis for action under the Act, because of an unexaminable opinion of the Executive.

The effect, so it was held, was this: that the assignment of the legislation to a category of Commonwealth power (e.g. defence) could only be made by reliance on assertions made by the legislature itself in the Preamble or by reliance on an as yet unformed and in any case unexaminable opinion of the Executive. That is to say that the Act was so drawn as to remove from the Court and usurp to the Legislature and the executive the basic function of defining the limits of powers granted by the Constitution. As early as 1803 the Supreme Court of the United States in the great case of *Marbury v. Madison*[8] had decided that the Court must finally decide the limits of constitutional powers. The principle of that case has always been accepted as axiomatic in the interpretation of the Australian Constitution.

It followed, the defendants not proposing to adduce evidence to prove the facts asserted in the Preamble, that there was no room for the plaintiffs' evidence in disproof, as the Act fell without investigation of the Preamble.

The main problem of the case might have stopped there had it not been for certain cases in which the very thing denied by the above arguments to the legislature and the executive had been permitted to them. Such cases were *Lloyd v. Wallach*,[9] *Ex parte Walsh*,[10] and *Little v. the Commonwealth*.[11] *Lloyd*

[6] (1944) 69 C.L.R. 457, at p.470.
[7] (1916) 21 C.L.R. 433.
[8] (1803) 1 Cr. 137.
[9] (1915) 20 C.L.R. 299.
[10] (1942) A.L.R. 359.
[11] (1947) 75 C.L.R. 98.

v Wallach will serve as the example. In that case, the War Precautions Regulations 1915 (inter alia) provided that " Where the Minister has reason to believe that any naturalized person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war."

Wallach had been detained pursuant to an order made by the Minister. On proceedings initiated by writ of habeas corpus, the High Court, on appeal from the Supreme Court of Victoria, held (inter alia) that the regulation was valid.

It should be noted, however, that *Lloyd v. Wallach* was not argued on the level of the present case. It was in fact a lineal ancestor of the now famous case of *Liversidge v. Anderson*,[12] and turned mainly on the question of whether or not there was judicial power to examine the soundness of the Minister's belief that Wallach was disaffected and ought to be detained,[13] when the discretion was given to the Minister in the terms in fact used.

In none of the three cases referred to were the limits of the defence power argued before the Court, nor did any member of the Court expressly decide anything by reference to those limits. But the cases must now, it seems, be taken as establishing that the defence power is wide enough in time of emergency, or at least in the emergency of total war, to support legislation of the kind there in question. A majority of the court expressly so held in the present case,[14] saying that it was now too late to question that, at a time when the country is heavily engaged in armed conflict, the defence power will sustain a law conferring on a Minister power to make orders of that kind and on such a basis.

The majority accepted the proposition that the emergency of a particular time could vary the application of the basic rule that the Commonwealth could not " recite itself into a power " where the defence power was concerned. It was agreed that the emergency of active war brings into play an extended power which will support even such unexaminable measures. But the majority held that the existing state of ostensible peace did not allow of the use of that extended power. There is a possible reconciliation of what might appear to be two powers (a defence power and an extended defence power) hinted at by both Dixon and Fullagar JJ.,[15] which is referred to below.

The important corollary of the apparent distinction between the two powers, however, was that the facts which brought into play the extended power were thought to be of such a general nature (that is, going to the general state of the nation's security with regard to external enemies) that they could be cognizable by judicial notice only, and could not be the subject of proof or disproof in the normal way. That view is stated by Fullagar J. and, semble, has the agreement of Dixon, McTiernan, and Williams JJ. It followed that proof of the dangerous propensities of some particular domestic organization could not of itself bring in the extended power, the use of which was required to support the Act. Kitto J. proceeded on somewhat different lines to the same conclusion.

It should be emphasized that the line at which the extended power referred to comes into operation is not arbitrarily fixed at the declaration of a war—it is drawn at the perception of a general state of overall defence emergency. Dixon J. said:—

> " . . . it is no doubt true that a mounting danger of hostilities before any actual outbreak of war will suffice to extend the actual operation of the defence power as circumstances may appear to demand. Throughout this case I have been impressed with the view that the validity of the Act must depend upon the possibility of bringing into application as at the date of the assent to the Act the conceptions as to the operation of the defence power

[12] (1942) A.C. 206.

[13] See a note on this point by Sir Frederick Jordan in 59 L.Q.R. at p.7, commenting upon an article by Dr. C. K. Allen in 58 L.Q.R. 232 criticizing the decision in *Liversidge v. Anderson*.

[14] See per Dixon J. at p.172, Williams J. at p.193, Fullagar J. at p.322, Kitto, J. at p.227.

[15] See per Dixon J. at p.173, and per Fullagar J. at p.212.

which hitherto have been generally regarded as appropriate only to a time of serious armed conflict.

Unless this were possible, I have failed to see a way of reconciling it with constitutional principle,"[16] and again

"To deal specifically with named or identifiable bodies or persons independently of any objective standard of responsibility or liability might perhaps be possible under the power in the case of an actual or threatened outburst of violence or the like, but that is a question depending upon different considerations."[16a]

The reconciliation of the apparent duality of defence power referred to above, is hinted by Dixon J. when he says:—

". . . administrative control of the liberty of the individual in aspects considered material to the prosecution of a war is regarded as a necessary or proper incident of conducting the war."[17]

It is seen then that the direct object or purpose supplied by the existence of a war to be prosecuted, while contained within the idea of defence, is something more specifically cognizable than the idea of defence. The suggestion is that an uncontrolled executive discretion to control or detain individuals may be seen as necessary to the conduct of war and so be not quite the same thing as a similar discretion directed only to defence generally. It is difficult, however, to see that the one less than the other usurps to the executive the real decision as to limits of power—particularly if the discretion is vested in the King's representative.

There are dicta in the judgments which frankly recognize the so-called extended power as something quite exceptional and sui generis.[18]

This note has, for convenience, proceeded on the basis that the defence power was the relevant basis for discussion. Some members of the Court, however, accepted the proposition that the defence power is referable to defence against "external" enemies only.[19] The question of S. 61 of the Constitution supported by S. 51 (xxxix) was therefore investigated fully. Section 61, it will be recalled, vests the executive power of the Commonwealth and Section 51 (xxxix) provides for the incidental legislative power.

It was suggested, but not decided, that the power of the Commonwealth to protect existing governments and governmental institutions from internal violence does not depend merely on those two sections, but on a much more general implied power to legislate for such protection.[20] The existence and general nature of such an implied power had been supported and described by Dixon J. in *Burns v. Ransley*[21] and *R. v. Sharkey*,[22] two recent cases under the Commonwealth Crimes Act sections relating to sedition.

That approach echoes what appears to be a settled principle applied by the Supreme Court of the United States in interpreting the Constitution of that country. In the recent case of *Dennis v. United States*,[23] in the joint majority opinion, it was said without reference to Art. II, Sec. 1, or Art. I, Sec. 8:[24]

"We reject any principle of governmental helplessness in the face of preparation for revolution, which principle carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power

[16] At p.173.

[16A] At p.172.

[17] At p.173.

[18] See e.g. per Williams J. at p.193.

[19] See e.g. Dixon J. at p.173, and Fullagar J. at p.212.

[20] See per Dixon J at p.169.

[21] (1949) 79 C.L.R. 101, at p.116.

[22] (1949) 79 C.L.R. 121, at pp.148-9.

[23] (1950) 95 U.S. Advanced Opinions p.865 at p.871 per Vinson C. J., Reed, Burton, and Sinclair, JJ.

[24] Containing the equivalents of Australian Constitution, Secs. 61 and 51 (xxxix).

of Congress to prohibit acts intended to overthrow the Government by force and violence."

In either case, the nature of the power contemplated is the same as that of the defence power and the same considerations apply, except possibly for this:— that the exceptional extended use of the defence power under which, as in *Lloyd v. Wallach*, in time of active war or great emergency, legislation of the kind in question could be valid, was not thought by Fullagar J. to have a counterpart in an extended power to protect internally. The learned Judge thought that legislation made under that implied power must always conform strictly to the principle of *Marbury v. Madison*.

It should be observed at this stage that all members of the court accepted the basic proposition that it was not for the court to enquire into the actual effect legislation might have in conducing to the defence of Australia. It was emphasized that it was for Parliament and the executive to decide what method was appropriate in practice for achieving the end desired (i.e. what would in their opinion efficiently achieve the defence of Australia); and that it was enough for the court to see that the legislation might reasonably be thought conducive or relevant to that end. But the legislation here in question could not be so seen without, on the one hand, accepting Parliament's recitals as conclusive, or on the other, accepting a future unexaminable opinion of the executive as providing the connection.

It was sought to support certain specific provisions of the Communist Party Dissolution Act as being validly within other legislative powers of the Commonwealth. In particular S.10 (i) of the Act provided that certain incapacities should attach to persons who were declared by the Governor-General under S.9. Thus, a person declared was to be incapable of holding office in the Commonwealth Civil Service (Sec. 10 (i) (a)), or as a member of a corporate body which was an authority of the Commonwealth (Sec. 10 (i) (b)), and was to be incapable of holding office in an industrial organization which was, in the opinion of the Governor-General, engaged in an industry vital to the security and defence of Australia (Sec. 10 (i) (c)).

It was sought to uphold those provisions as being within the undoubted power of the Commonwealth to make laws governing the Federal Public Service, and, so far as industrial organizations were concerned, as within the Constitutional power to make laws for the conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.[25] So far as that latter question was concerned, the argument in support of the provision was based on the established interpretation of Commonwealth industrial power as authorizing some laws affecting organizations registered in the Commonwealth Arbitration system. It was argued that by confining the application of S.10 (i) (c) to such registered organizations, the provision could be held to be within the power.

Those arguments were rejected and the provisions held to be invalid. So far as the provisions relating to persons holding office under the Commonwealth were concerned, the argument broke down because it was held that the operative provision for declaration in S.9 could not be confined as with respect to a topic within the power. Dixon J. summed the matter up by saying that the declaration of a person under S.9 . . .

> " may be published of anybody, whether or not he is in the service of the Commonwealth, or an authority of the Commonwealth, or whether or not there is any chance of his ever entering such a service. Such a provision cannot, in my opinion, be referred to the power over those serving the Commonwealth . . . simply because one consequence assigned to the declaration is that it disqualifies the declared man for such service."[26]

[25] Sec. 51 (xxxv) of the Constitution.

[26] At p.179.

So far as the provision relating to industrial organizations was concerned, it was held that the provision was not with respect to the subject-matter expressed in S.51 (xxxv) of the Constitution. Again, Dixon J. sums up the reasoning neatly:—

> " It is not a law with respect to conciliation and arbitration for the prevention and settlement of two-State industrial disputes. The only way in which the power can be made applicable is through registration. The Legislature authorizing registration may, as an incident of the power in virtue of which it does so, impose conditions. But S.10 (i) (c) speaks entirely independently of registration, which it ignores as an irrelevancy. It is not addressed to the organization, but to the declared person. No condition or duty is imposed on the body in relation to legislation or otherwise. It simply incapacitates the man."[27]

It followed naturally that the main operative provisions of the Act, which have been referred to, having been held invalid, the remaining provisions of the Act which were mainly of a consequential nature, fell also.

Kitto J. was in substantial harmony with the line of reasoning outlined above, so far as it related to the basic question of whether or not Parliament could be permitted to fix, either by its own assertions or by delegating a discretion to the Executive, the ambit of the defence power. He differed, however, from Dixon, McTiernan, Williams, and Fullagar JJ. in verbally distinguishing the kind of laws and executive acts in issue in *Lloyd v. Wallach, ex parte Walsh,* and *Little v. the Commonwealth,* from the legisation in question in this case. The learned Judge's reasoning in doing so is not convincing and, with respect, it is doubted that the distinction drawn has any real substance or that his real approach to the cases is substantially different from that of the other members of the majority in agreement with Dixon J.

Latham C.J., was in solitary but vigorous dissent. He held the Act to be valid in all its parts. In brief, the basis of his reasoning was that the defence power, being purposive and being in its proper exercise vital to the continuance of the Commonwealth, involved the exercise of high policy functions which could only be performed by the Government and Parliament, and not by the Court. It was clear, he thought, that in time of total war the power conferred on the Government and Parliament was all that was needed for the proper exercise of that function. He thought that during times when the country was not actually engaged in war, it was still only the Government and Parliament that could assess and make decisions about the dangers which threatened the Commonwealth, and in particular, it was only the Government and Parliament which could decide *who* were the Commonwealth's enemies. The decision with respect to such dangers and such enemies was, he thought, a political and not a judicial one. The statements in the Preamble to the Act were expressed decisions on those matters made by the body appropriate for the making thereof, and must be accepted as such by the Court. In effect, he said that the Act declared the Communist Party to be the enemy of the Commonwealth, and that being so, S.4 dissolving the Party was the most obvious means of preventing the Party's activities, and could not be questioned as an exercise of Commonwealth power. The other suppressive provisions followed naturally.

The learned Chief Justice, consistently with his opinion delivered in the *Uniform Tax Case*[28] and the *Bank Nationalization Case*[29] rejected the view, received implicitly or explicitly by other members of the Court both in this and other cases, that a law might be held to be ultra vires of the power of the Commonwealth because it " goes too far " or " is incommensurate " or " is too drastic " or " is not reasonably necessary," notwithstanding that it might be prima facie with respect to a subject-matter committed to the Commonwealth

[27] At p.179.

[28] (1942) 65 C.L.R. 373.

[29] (1948) 76 C.L.R. 1.

by the Constitution. He insisted that those considerations were of a political character; the proper arena for their debate was the floor of Parliament; and the proper safeguard against their undesirable conclusion was the democratic system of elective and responsible government.

It remains to note one aspect of this case which is of interest to all lawyers reared in a Common Law system. That is, the constant reference by the majority judges to the fact that the legislation before the Court did not operate by attaching legal rights or duties or obligations or incapacities to individuals by reference to any objective standard of conduct or behaviour, but dealt specifically with named or identifiable bodies or persons, independently of any such objective standard of responsibility or liability.

The Court has been accustomed to look to the conduct or activity regulated or affected by legislation to decide whether or not the legislation is reasonably connected with the power under which it purports to act—e.g., the regulation of the activity of making ammunition is with respect to defence because the activity itself is closely connected with necessary defence measures. The fact that this law worked to prevent individuals and bodies from engaging in activities hostile to the defence interests, not by selecting, as criteria for operation of the law, their conduct if they did so engage, but by preventing them by name because they might so engage, removed from the Court its customary method of testing the limitations of power. Williams J. explicitly decided that the Act was invalid on this ground, saying in effect, that Parliament must leave to the Courts the means to test the limits of power, and that could only be done by providing some objective standards for examination.[30]

At the same time, the nature of the law is one which runs counter to the general trend of Constitutional and legal opinion since the end of the seventeenth century, as to the proper way of affecting the legal rights and duties, and in particular, the civil liberties of the subject—except in times of national emergency. Dixon J. reverted at a number of points to this aspect of the legislation and said (inter alia) of the defence power:—

> "The power is ancillary or incidental to sustaining and carrying on government. Moreover it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connexion with the power upon the conclusion of the legislature concerning the doings and the designs of bodies or persons to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth. Indeed upon the very matters upon which the question whether the bodies or persons have brought themselves within a possible exercise of the power depends, it may be said that the Act would have the effect of making the conclusion of the legislature final and so the measure of the operation of its own power. Nor do I think that if a wider basis for the power than Sec. 51 (xxxix) is accepted, the power itself would extend to a law like the present Act, using as it does, the Legislature's characterization of the persons and bodies adversely affected and no factual tests of liability and containing no provision which independently of that characterization would amount intrinsically to an exercise of the power."[31]

[30] At p.190—and see at p.192, where the learned Judge said :—" But the legislation would have to define the nature of the conduct and the means adopted to combat it, so that the Court would be in a position to judge whether it was reasonably necessary to legislate with respect to such conduct in the interests of defence and whether such means were reasonably appropriate for the purpose."

[31] (1951) Argus Law Reports, Pt. 5, p.172.

An interesting contrast is provided by the *Smith Act* in the United States. That Act in substance made it unlawful for any person knowingly or wilfully to conspire to advocate or teach the overthrow of the Government by force or violence. The Act proscribed particular conduct which fell within that general description—e.g., organizing a Society to teach or encourage the overthrow of Government by force. In the case of *Dennis v. United States*,[32] the Supreme Court by a majority held the Act to be valid, and held that it did not infringe the first amendment as being a restriction on the freedom of speech. It is to be observed that the case only reached the Supreme Court on certiorari after a lengthy trial in which Dennis and others had been convicted of conspiring to advocate the overthrow of the Government by force or violence. In that case, the Act of Congress had proscribed certain conduct, vague it is true, but none the less capable of investigation by ordinary judicial methods. The Australian Act, on the other hand, had prejudged the conduct and attached the persons and bodies thought by Parliament to be guilty of it.

In so far as the decision of the majority in the *Communist Case* was affected by their traditional dislike of legislation of that kind, the pith of the Chief Justice's dissent is in his insistence that the legal results of the accident of Federation should not be used as an obstacle to such undesirable legislative practices, but that the controlling protection must be the continued existence of an elected deliberative Assembly.

Seductive though that approach may be to one who looks for the sometime unification of the Commonwealth of Australia, it cannot be forgotten that the " accident of federalism " in fact occurred. The interpretation of the Constitution, along the lines followed now for fifty years, cannot be ignored. The general principles governing the relations between the judicial and the legislative authorities have been settled.

That the early attempt to make an exception of the legislative power with respect to defence, so as to allow paramountcy to that power, failed, was confirmed in a number of cases during the recent war.[33] The majority decision in the present case re-emphasizes that failure.

The acceptance of the learned Chief Justice's reasoning would mean that, at least to some extent, the Federal Parliament would be able to decide the limits of its own power whatever the circumstances existing at the time. It is fair to say, however, that the area within which Parliament could so determine the scope of its own power would be limited to the defence power. And that even within the scope (whatever it proved to be) of that power all judicial review would not be excluded. For Parliament having defined the danger against which defence was needed, the Courts would still function to say whether or not the legislative measures adopted were reasonably connected with that defence. It is submitted, on the other hand, that that judicial safeguard would in practice be somewhat illusory because, Parliament having defined the danger, any law dealing reasonably directly with the danger in a negative manner would necessarily be reasonably connected with defence against that danger.

The decision of the majority means that the limits of the powers distributed by the Constitution between the Commonwealth and the States will continue to be defined by an independent Judiciary, and that that fundamental position will only be relaxed in times of grave and pressing national emergency. Such an emergency was not seen by the Court to exist in the year 1950.

The major unsolved problem is just how the Court, in a situation short of war, is to apprise itself or is to be apprised, of an emergency situation which calls for the exercise of the so-called extended defence power. The solution of that problem involves the difficult question: for what issues and in what cases

[32] See note 23 supra.

[33] See e.g. *The Industrial Lighting Case* (1943) 67 C.L.R. 413 ; *Gratwick v. Johnston* (1945) 70 C.L.R. 1.

should evidence be admissible in Constitutional cases.[34] That question is properly the subject of an independent study.

NIGERIA'S CONTRIBUTION TO COLONIAL LAW

[*Contributed by* T. O. Elias, LL.M., Ph.D.]

The aim of this paper is to draw attention to certain Nigerian legal decisions laying down some of the more fundamental principles of law and of administrative policy which have more than a merely Nigerian significance. It may be that some less well-known decisions of certain local courts elsewhere have considered or embodied the same or similar principles, but those we are about to study represent authoritative land-marks by reason of their being appeal pronouncements of the superior courts in England (and in Nigeria).

We may classify the cases into the following broad categories:—(a) Property Law (b) Constitutional Law; (c) Customary Law and administrative policy.

(a) *Property Law*: Let us preface our remarks under this heading with this High Court statement of Pearson, Assistant J., in *Wokoko v. Molyko*[1] (a land case in Buea in the Cameroons under British mandate (now, *trust*)): " A principle of British policy in West Africa is to assure the title in the land to the native proprietors by customary law. In furtherance of this principle, native tribunals exercise jurisdiction in matters affecting title to land, wherein they are best able as courts of first instance to investigate the relevant native customs." It must be pointed out, however, that this *original* jurisdiction of native courts in land matters is displaced where, as in Lagos, there is no system of native courts to exercise it. When such is the case, local ordinances are passed giving the Supreme Court (or High Court) an *original* jurisdiction in those areas without native courts, and an *appellate* jurisdiction over cases coming on appeal from native court areas.

The first notable case of *A.G. v. John Holt & Co. Ltd. and anor*[2] is interesting in at least *two* important respects: (i) It settles the principles which should determine, as between the Crown and private persons, the ownership of the seashore skirting a ceded territory; (ii) an incidental legal issue of wider implication in English law generally is the Court's finding on the scope and nature of easements as a whole.

The facts briefly were: The Lagos island with its environs was ceded by the then local king to the British Crown in 1861. The defendants-respondents meanwhile acquired parcels of land adjoining the lagoon from certain local " owners," later reclaimed parts of the foreshore and bed of the lagoon, erected thereon piers and other buildings, and from time to time stored casks, etc., on parts not so built upon. Since 1907, however, a road had been constructed by the Government between these buildings and the waterside, thus interposing a public thoroughfare between their piers and their stores, beside rendering their premises exposed to public access by land. The Attorney-General, on behalf of the Government, prayed for (1) a declaration that the Crown is by the treaty of cession of 1861 "seised of and entitled to the whole of the foreshore of the lagoon surrounding Lagos island and of the arms and creeks thereof, between high-water and low-water mark as also the bed of the said lagoon and arms and creeks thereof, as far as the tide ebbs and flows, or of so much of such foreshore and premises as is appurtenant to the lands of the respective defendants "; (2) an injunction to restrain the respective defendants from hindering, preventing, and molesting His Majesty in the peaceable and quiet enjoyment and possession of

[34] See, for an introduction to the problem, the paper delivered by J. D. Holmes, K.C., to the Sixth Legal Convention of the Law Council of Australia, entitled " Evidence in Constitutional Cases," and discussion thereon. 23 A.L.R. p.235.

[1] [1938] 14 N.L.R. 41.

[2] [1915] A.C. 599 ; 2 N.L.R.I.

the said foreshore and premises; (3) a direction that an easement for the purpose of storing on reclaimed land coopers' stores, casks, trade goods and produce is unknown to English law; (4) an order that, in any case, the defendants' claims to the various easements must fail since their use of the land was not a right assumed or asserted over the land of *another*—the Crown's *de jure* possession and ownership being there all the time. The defendants denied the Crown's claim and asserted their own right to the ownership of the foreshore adjoining their lands through their predecessors in title.

It was held by the Privy Council, on appeal from the Supreme Court in Lagos, that (1) as the land in question had been in the *de facto* possession of the defendants for less than sixty years, ownership by prescription under the Statute of Limitation could not have been acquired by them as against the Crown whose *de jure* possession of the foreshore under the Treaty of Cession remained unimpaired; (2) as the defendants' possession of the land had been exclusive, no question of easement could arise, since there were no separate dominant and servient owners; (3) but as the Government must be taken to have acquiesced for rather over forty years in the defendants' purported acts of ownership, the latter were entitled to rights in the nature of a perpetual licence entitling them to continue indefinitely to store and build such things thereon and generally to use the said reclaimed land in such manner as they might deem expedient for the purpose of carrying on their business as merchants . . . " Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The Law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application . . . "[3]; (4) foreshore land added to by natural, imperceptibly slow and gradual *accretion* or *dereliction* (i.e., a recession of the sea behind the usual water-mark) belongs to the occupier, but that added to by *reclamation* belongs to the Crown; (5) the English and Nigerian local laws on the rights of riparian occupiers are practically identical, since the whole rule has been based on the social requirements of general convenience.[4]

This case also illustrates the first time, at least in Nigeria, that the procedure by *Information* was applied to a colonial condition; and it is significant that the necessities of such a situation should impel a departure from the strict English Information procedure.

The constitutional issue that emerges from the case is that cession of land to the Crown does not grant " sovereignty and jurisdiction alone to the exclusion of property " in the land; territory also passes, by English Constitutional law, to the Crown. But the rights of previous occupiers remain unaltered, unless and until later legislation of the Imperial or Colonial Executive modifies policy.

The case we wish to consider next has now become the *locus classicus* on the whole question of the general nature of Colonial land rights[5] as well of local chiefs as of individual family members. It is the famous *Amodu Tijani v. Secry., Southern Nigeria.*[6] Land at Apapa in the occupation of tenants of the Oluwa Chieftaincy family was under the Public Land (Acquisition) Ordinance (1903)

[3] [1915] A.C. 599 ; 2 N.L.R.I. cited at p. 617 ; on p. 223 of G. C. Cheshire's Modern Real Property (6th edn.).

[4] See [1915] A.C. 599, at p. 613.

[5] So regarded in (*a*) Sobhuza II *v.* Miller [1926] A.C. 518, at p. 525 (*a case from Swaziland Protectorate*) ;

(*b*) Sunmonu *v.* Disu Raphael [1927] A.C. 881, at pp. 883-4.
(*c*) Bakare Ajakaiye *v.* Lt. Governor, S. Provs. [1929] A.C. 679, at p. 680.
(*d*) Eshugbayi Eleko *v.* Govt. of Nigeria [1931] A.C. 662, at p. 672.
(*e*) Hoani etc. *v.* Aotea District Maori Land Board [1941] A.C. 308, at p. 315. (*A case from New Zealand*).

[6] [1921] 2 A.C. 399 : also cited on p. 402 of *Wade and Phillips* : Constitutional Law (4th Edition) and pp. 337-350 of *M. F. Lindley's* " Acquisition and Government of Backward Territories in International Law " (1926).

acquired by the Nigerian Government for public purposes. On appeal from the Supreme Court Lagos to the Privy Council, their Lordships held (1) that while by the cession of 1861 the radical title in the Colony lands passed to the Crown, the latter acquired little more than " the limited right of administrative interference," the original rights of the inhabitants remaining unaffected; (2) that the Nigerian Government was accordingly bound to pay compensation for the piece of land acquired on the adjoining mainland of Apapa; (3) that the chiefs of West Africa (and, therefore, the Chief Oluwa in this case) are with regard to land, in the position of trustees on behalf of their communities, but that the chiefs' rights of administrative control of land are substantial enough to deserve separate compensation out of the total sum paid by the Government.

The position this *cause celèbre* occupies in the legal history of colonial land rights is further emphasized by a comparison with the famous case of *In re Southern Rhodesia*' [1919] A.C. 211. There, as in the *Amodu Tijani's Case* a little later, the Privy Council held that on a cession of territory to the Crown, clearly established rights of " ownership " of the local communities remain unaffected by a change of sovereignty. But whereas such rights were held entitled to be respected by the Crown in the Apapa land case, in the *Southern Rhodesian Case* the known rights of the inhabitants of Matabele were held not to constitute private rights which the Crown should recognise.

Another notable land case which, according to the learned Editor of the All England Law Reports, " will be of interest wherever there are native lands," is *Oshodi v. Balogun & Ors.*[7] which deals with certain aspects of family land not dealt with by the other two we have just considered.

In the present case, an *arota* (a former slave of the Chief Oshodi Tappa) to whom a part of the Oshodi family compound in Lagos had in 1869 been granted under customary tenure, purported to transfer in 1913 an absolute or fee simple interest in part of his compound without the consent of the Oshodi family. The purchaser from him claimed in 1927 to be entitled to the fee simple as the result of the conveyance to him and of a subsequent acquiescence for over forty years by certain members of the Oshodi family. Held that (1) no absolute fee simple title in the property could pass since there had been no prior consent by the Chief and his family and since even a free-born member of the family would have needed such consent to validate any attempted alienation of the family land; (2) although the application of the doctrine of laches to places under customary law is in a fluid state, nevertheless there could not be any sufficient subsequent acquiescence by the Oshodi family in view of the twenty years' vacancy in the family chieftainship itself. It is perhaps interesting to observe that in *Akpan Awo v. Cookey Gam*[8] and similar decisions, the Full Court in Lagos has ruled that in the absence of a Statute of Limitation, it is inequitable to deprive persons of property of which they have held undisputed possession for many years; and that it may fairly well be presumed that the land-owning family have acquiesced in any unauthorised dealing with the property over an unreasonably long period of time. The pressure of trade and the impact of English ideas of law have both rendered necessary some such ruling as this in a situation where no Statute of Limitation operates to bar an apparently stale claim. It is not, of course, to be inferred from this, as has often been incorrectly asserted in many quarters, that lapse of time is no bar to claims relating to colonial land rights. Under customary law there are situations in which clear evidence of abandonment or of inexcusable acquiescence for an unreasonable period might be fatal to the claims of an individual member of a family or community. The strict rule of customary law that lapse of time is no bar has relevance only in cases such as (1) unauthorised dealings with family land in circumstances contrary to the ultimate right of reverter in the land-

[7] [1936] 2 A.E.R. 1632.
[8] [1913] 2 N.R. 97.

owning family, or (2) the indefeasible right of the pledgor's family to redeem land given in pledge to another for a money loan.

Finally, it may be remarked that in Nigeria and probably everywhere else in the Colonial territories, situations normally governed under English law by the Limitation Act, 1939 (formerly, Statutes of Limitation) are usually dealt with under the equitable jurisdiction of the Supreme Court. This wide discretion has led very often to divergent judicial opinions in practically identical cases, and the equity of the colonial judge of such matters would seem to vary as the judge's foot. That is probably why Lord Maugham in the case under review recommended that the doubts created by these differences of judicial opinions " make it very desirable to deal with these questions by legislation." But it is a question whether any *a priori* solution of the problem by legislation would not cause more confusion. An indispensable pre-requisite would be a careful study of the customary rules of lapse within the wider context of contemporary social and economic needs of the territory concerned.

All the cases so far considered are primarily concerned with problems of colonial customary land law, apart, that is, from the constitutional issues we have mentioned along with them. A land case of unique significance, however, is *Ipaye v. Aribisala*,[9] which concerns an issue transcending the immediate precincts of Nigerian property law. The plaintiff, Ipaye, and his brother Falade, became joint tenants under their mother's voluntary settlement and the deed was left in the custody of Falade. Unknown to the plaintiff, Falade had deposited the title deed with the defendant as security for a loan of thirty pounds, thereby creating an *equitable* mortgage of Falade's share in the estate; Falade even forged the plaintiff's signature to the loan agreement by getting someone to impersonate his brother. Held by the Supreme Court that there had been a severance of the joint tenancy so that the English doctrine of survivorship, which was applicable in all such cases of joint tenancy, did not however operate to vest the legal estate in the plaintiff alone. The defendant was therefore entitled to the title deed until the mortgage debt was repaid to him.

The great question, of course, was: Did the creation by a joint tenant of an *equitable* mortgage of his share sever the *legal* joint tenancy? Now, there was no exact precedent for it either in English or in Nigerian or in any other empire country's land law. Ample authority exists for the view that a *legal* mortgage by one of two joint tenants of land effects a severance of a legal joint tenancy.[10] But does an *equitable* mortgage necessarily have the same result? Kingdon, C.J.'s reply was: " Whether or not an equitable mortgage has the same effect appears never to have been decided."[11] Nevertheless, Petrides, J., rested the decision already stated on this dictum of Jessel, M.R., in *Carter v. Wake*.[12] " Where there is a deposit of title deeds the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage."

It seems fair to say that this Nigerian decision has created a precedent, albeit a merely persuasive one, in developed colonial, no less than in English, law of property (especially, mortgage law).

(b) *Constitutional Law*: It will probably be sufficient here to draw attention to the two famous cases of the same name of *Eshugbayi Eleko v. Government of Nigeria*.[13] In the first suit of 1928 the Judicial Committee of the Privy Council had to consider an application by the plaintiff-appellant, the Oba of Lagos, a local ruler, for the writ of Habeas Corpus after his deportation from the colony of Lagos to the hinterland Protectorate had been ordered by

[9] [1930] 10 N.L.R. 10.

[10] See, e.g. *York v. Stone* (1710) 91 E.R. 146 ; *Re Pollard's Estate*, 142 E.R. (1863), p. 161.

[11] [1930] 10 N.L.R. 10, at p. 13.

[12] [1877] 4th D. 605.

[13] [1928] A.C. 459 ; and [1931] A.C. 662.

the Nigerian Government on instructions from the Colonial Secretary in the United Kingdom. Docemo (the Oba of Lagos) had made successive applications for the writ to one judge after another of the High Court of Nigeria, insisting that each application should be determined strictly on its merits. The Privy Council held that the plaintiff-appellant's contention was right and that, consequently, a British subject has under the Habeas Corpus procedure the right to apply successively to all courts with competent jurisdiction until he has taken his case before all the available judges in the land. He may thereafter appeal to the Court of Appeal and the House of Lords, if in England, or to the Privy Council, if in Empire territories.[14] The importance of this case is that these precise points do not seem to have been litigated or laid down before.[15]

The second suit of 1931 arose in connection with another aspect of the same case. On the representation of the Nigerian Government the deportation of Eshugbayi Eleko had been ordered by the Colonial Secretary under the wrong belief that he was not a British subject but an alien. Eshugbayi then sought in the Nigerian Courts to have the question of alienage or non-alienage determined by means of the procedure of the Habeas Corpus writ—in itself a novel claim. The Privy Council held that that was the correct procedure.[16]

These two cases[17] illustrate the scope, by no means finally fixed, of the operation of the writ of Habeas Corpus as a means of ensuring the liberty of the subject and of curbing possibly arbitrary exercise of power by a colonial executive. It is hardly necessary to add that the principles enunciated in both decisions are of *general* application in English law.

(c) *Customary Law & Administrative Policy*: Another Nigerian case of some colonial legal importance is *Oke Lanipekun Laoye & Ors v. Amao Oyetunde,*[18] the short point of which was, the determination of the question whether or not Amao Oyetunde had been elected Bale of Ogbomosho according to local customary law and tradition. This would not by itself have merited our special attention were it not for Lord Wright's interesting consideration in the case of the relation between Ordinances[19] and customary law. As a preliminary but important declaration of policy Lord Wright observed:

> " The policy of the British Government in this and in other respects is to use for purposes of the administration of the country the native laws and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances affecting Nigeria. The courts which have been established by the British Government have the duty of enforcing these native laws and customs, so far as they are not barbarous, as part of the law of the land. In particular, native laws and customs regulating the appointment and election of chiefs have been recognised as having the force of law. This was pointed out in the judgment of this Board in *Eshugbayi Eleko v. Nigerian Government* [1931] A.C. 662, 673."[20]

His Lordship then went on to say that the local law as to the appointment

[14] But to any colonies (including what are now Dominions) with courts having authority to issue and execute the writ, the Habeas Corpus Act 1862 says that the writ cannot issue.

[15] And this, in spite of Mr. R. F. V. Heuston's contention to the contrary at pp. 79-87 of L.Q.R., Vol. 66.

[16] It is otherwise in the case of a British Protectorate where the grant of a writ of Habeas Corpus is an act of State not justiciable in a British Court. Hence, in *R. v. Crewe* (1910) 2 K.B. 576 a native chief in Bechuanaland was refused his application for the writ of Habeas Corpus.

[17] Both cases are briefly discussed on pp. 188 and 344 of *Wade and Phillips* : Constitutional Law (4th Edition).

[18] [1944] A.C. 170 : 113 L.J.P.C. 56.

[19] Local Colonial Statutes are called Ordinances.

[20] In the Eshugbayi Eleko Case the Privy Council emphasized that, while the Governor could make a deportation order under S.2(2) of the Deposed Chiefs Removal Ordinance, 1917, without previous proceedings before a magistrate, his powers were merely *executive* and it was the duty of the Court to investigate the questions raised by the appellant's contentions and to make a *judicial* decision thereon.

of chiefs as put in evidence by the appellants was well-established, and the trial judge had so ruled. But the latter thereafter assumed that this established customary law on the subject had been superseded by the combined provisions of the Native Authorities Ordinance, 1933, and of General Order (e). The first ordinance charged all Native Authorities with the obligation to maintain order and good government, and the dispute in Ogbomosho was accordingly submitted to the Olubadan-in-Council, to which Ogbomosho is administratively subordinate; the British Resident at Ibadan approved the Olubadan's recommendation in favour of the respondent. The second ordinance delegated to Chief Commissioners and Residents the Governor's executive power to approve appointments and dismissals of staff under native administration, and in the present case the Chief Commissioner had confirmed the Resident's approval of the Olubadan's recommendation. On these *statutory* grounds the trial judge held that the respondent had been properly appointed, although the customary law had not been followed.

As against this, his Lordship pointed out that the Native Authorities Ordinance and the General Order did not change the applicable local law and custom, since each statute only gave " supplementary powers to a *Bale,* but have nothing to do with the actual appointment." To be similarly rejected was the West African Court of Appeal's finding that Ordinance No. 14 of the Laws of Nigeria of 1930, entitled "An Ordinance to provide for the appointment and deposition of Chiefs in the Colony (sc. Lagos) and Head Chiefs in the Protectorate," ousted the jurisdiction of the lower Court and made conclusive the recognition by the Governor of the respondent as Bale. While it is true that S.2 (2) of this Ordinance provided that "The Governor shall be the sole judge as to whether any appointment of a chief or head chief, as the case may be, has been made in accordance with native law and custom," his Lordship nevertheless held that, since the Bale of Ogbomosho is not a head chief in the Protectorate, being subordinate to Ibadan, and is not a chief in the Colony of Lagos, sub-s. 2, if read as a whole, has no application to his office. In the result, concluded Lord Wright:

> " This Ordinance, therefore, cannot any more than the legislation relied on by the trial judge, serve to over-ride or qualify the relevant law and custom, which both courts on evidence which their Lordships regard as conclusive, have accepted as established."

The appeal was accordingly allowed and the first appellant declared to be entitled to the Baleship of Ogbomosho.[21]

Two related principles would seem to emerge from this Privy Council judgment: (a) The Court would be slow to hold that well-established rules of valid customary law have been superseded or modified by statute, whether an Imperial Act or a local Ordinance; (b) Wherever colonial law and colonial administration appear to be concentrated in one hand or a clearly judicial function is given by a local statute to a colonial executive, the Court would give to the statute that interpretation which should ensure the effectiveness of a valid rule of traditional law, unless the relevant statute has by express stipulation or necessary intendment altered the particular rule of customary law.

We may now briefly summarise the main points raised in this paper as follows:—

1. *The John Holt Case* considers
   - *(a)* The nature of the Crown's title to colonial lands, particularly under a treaty of cession.
   - *(b)* A peculiar form of easement—viz., the perpetual right to place things on the land of another, even without consideration.
2. *The Amodu Tijani Case* deals with
   - *(a)* The Nature of the Crown's title to colonial lands, and holds that, while the radical title is in the Crown, the Crown enjoys no more than " a limited right of administrative interference," and that the

[21] This case was briefly noted in the January 1945 issue of *Law Quarterly Review*, Vol. 61, p.4.

rights of local families and communities remain unaltered by a treaty of cession;

(b) The legal status of a local chief, viz., that of a trustee of his powers, with respect to land belonging to a native community.

3. In *the Oshodi Tappa Case* are considered two fundamental principles of colonial customary law:
   (a) That unauthorised dealings with family or community land by a member, contrary to the traditional law on the subject, are invalid; to be valid, the consent of the whole unit or a substantial portion of it, is essential;
   (b) That lapse of time is usually no bar to a right of action under customary land law: but in certain circumstances such as obvious abandonment or inexcusable acquiescence, lapse of time is a bar.
4. In *Ipaye v. Aribisala* we note another peculiarity, this time a normal development of the English law of mortgage. It was there held, in the absence of any clear precedent, that a legal joint tenancy can be severed as much by an *equitable* as by a *legal* mortgage of the interest of one of the joint tenants.
5. On the constitutional side we find laid down in *the Eshugbayi Eleko Case* clear principles governing not only the application to colonial territories of the writ of Habeas Corpus but also the right of a British subject in the colonies, no less than in England, to take his case before every court with competent jurisdiction and, if that fails, to apply to the Privy Council or the Court of Appeal and the House of Lords as the case may be. The case also illustrates how the rights of British subjects are safeguared against an arbitrary executive.
6. *The Oke Lanipekun Laoye Case*
   (i) Illustrates the problems, legal as well as administrative, which chieftaincy disputes entail in colonial territories;
   (ii) Holds that the Court will not lightly declare that an established rule of customary law has been altered by a local ordinance, unless the latter expressly or impliedly says so.
7. Finally, we have a re-statement of established British policy towards colonial customary law in *Wokoko v. Molyko* and again in *Oke Lanipekun Laoye,* to the effect that on the establishment of British administration in a colonial dependency the usual practice is to recognise well-established local law and custom which are not barbarous or inconvenient.

THE COURSES IN LONDON FOR GERMAN LAW STUDENTS, 1948-1950

[*Contributed by* P. L. Bushe-Fox, Esq.]

The object of this article is to give some account of the courses in English law for students from the British Zone of Germany which were held in London between October, 1948 and June, 1950, under arrangements made by the Foreign Office in conjunction with the Law Society. Though those courses were held for special reasons connected with the occupation of Germany, it is thought that, both in the way they were organized and conducted and in their results they may contain some features of general interest and perhaps of encouragement, to those concerned with the study and teaching of comparative law.

In the first place, it must be briefly explained why these courses were held. It was stated in the Potsdam Agreement of August, 1945, that one of the objects of the Occupation was the reorganisation of the German legal system in accordance with the principles of democracy and of justice under law. The British authorities in Germany recognised that this objective could not be attained by

Military Government legislation and directives alone. Though they could give guidance and help in many ways, the rebuilding of the German legal system was essentially a long-term task, which had largely to be carried out by the Germans themselves. Looking to the future, the British authorities suggested that it would materially assist in attaining the objective in view if some of the most promising law students of each year could come to England and be given a good understanding of the way in which the English legal system works and of the principles upon which it is founded. This suggestion was not made with any intention of trying to encourage the importation into Germany of all the principles of the English legal system or the provisions of English substantive law. What was in mind was that the students should have an opportunity of seeing a democratic legal system in operation and of learning something of the law of another country, so that, with the wider outlook and knowledge thus acquired, they would be better equipped to make their own contribution in the future to the rebuilding of the German legal system.

The outcome of the suggestion made in Germany was that the Foreign Office arranged with the Law Society for four courses (later increased to six) to be held at its School of Law in London, each lasting 8 weeks and each attended by 25 students. In the conduct of the courses, the division of responsibility between the Foreign Office and the Law Society was briefly as follows. The Law Society, in consultation with the Foreign Office, prepared the syllabus, and engaged lecturers for all the subjects covered in it save the introductory lectures on English history. The panel of lecturers, it may be mentioned here, consisted of University professors and lecturers, practising barristers and solicitors and members of the staff of the Law Society's School of Law. The Foreign Office appointed two Tutors, who, in addition to giving general supervision to the students' work, conducted discussion periods, escorted the students on visits, and did all translation work including acting as interpreters at lectures. The Foreign Office was responsible for the students' accommodation and welfare; all the expenses of the courses were borne on the Vote of its German Section.

The syllabus of each course consisted of lectures, discussion periods with the Tutors, and visits. Each course began with four introductory lectures on English history; these were followed by 18 lectures on the Constitution, 18 on the English legal system, 15 on various topics of English Civil Law and 6 on Criminal Law. The visits, which generally numbered about 16, were to Courts of Law of nearly every kind in the London area, the House of Commons, the Inns of Court (including visits to barristers' chambers), the Law Society's Offices and Services Divorce and Poor Persons' Departments, solicitors' offices and the London County Council. In later courses, visits to Borstal Institutions were also included in the syllabus.

The 25 students who attended each course were selected from men and women who had taken their University degrees but had not yet got their full professional qualifications. Each of the four Länder of the British Zone had a quota according to its size; for the sixth and last course of the series the British Sector of Berlin also had a quota. The selection was made by the German authorities in each area in co-operation with the British authorities there. Though it was realized that a knowledge of English would help the students to profit more from the courses, no language qualification was imposed. The object was to select outstanding students who would be likely to rise high in their profession, and it was thought that the arrangements for translation and interpretation would minimize the disadvantages of those who did not speak English. Moreover, students were selected well in advance of the beginning of the course they were to attend; they were encouraged to devote as much time as possible to studying the language before they left for England.

The work of each course was conducted in the following way. The lecturers provided scripts of their lectures, which were translated into German by the Tutors. Two or three days before a lecture was due to be given, copies of it

in both English and German were given to the students who were thus able to study the subject before the actual lecture period. Because of that previous study, the lecturer could devote the period to enlarging upon what he had already written, instead of simply reading it out, while the students came to the period with some acquaintance with the subject and prepared to ask for explanations of what they did not understand. One of the Tutors attended each lecture to act as interpreter. Naturally, with many different lecturers there were variations in the way in which lecture periods were utilized. The general practice, however, was for the lecturer to begin by amplifying what he had written, and to leave the rest of the time free for questions and discussion. That part of the period often took on the character of a discussion group, with the students not only asking questions but also drawing comparisons between what they had been told of English law and the corresponding provisions of German law.

Besides the discussions which took place in lecture periods, certain times were set aside for the Tutors to conduct discussion groups. The original object of these periods was to give the students opportunities to discuss the visits, particularly those to the Courts, which they had made and to obtain explanations of aspects of the proceedings which they had not understood. It was soon found, however, not only that discussion of points arising out of visits did not occupy all the time available, but also that these periods could serve a most useful purpose in enabling the students to bring up subjects not covered by the lectures.

Little need be said of the remaining part of the syllabus, the visits. It may be mentioned, however, that it was in the visits to Courts that the language difficulty was chiefly felt. It was naturally impossible to have the proceedings interpreted into English at the time. A further difficulty often met was that of a visit not coinciding with the beginning of a case, so that it was hard even for those students with a good knowledge of English to make out what it was all about. Whenever possible, therefore, arrangements were made shortly beforehand to ascertain the points involved in the case which would be before the Court at the time of the visit.

Very little modification of the syllabus as originally planned was found to be necessary. At the end of each course the students were encouraged to suggest any alterations and improvements in the arrangements which occurred to them, but save in one respect, they had hardly any criticisms to offer of the syllabus. The exception was an interesting one: there was a strong demand, which, however, could not be met, by the students on each course for facilities to visit a prison; they found it very surprising that the study of penology and a knowledge of the country's penal system should not be part of the training of an English lawyer.

Now that some account has been given of the syllabus of the courses and of the way in which they were conducted, it remains to speak of the impression they made on the students. Before the courses began, those responsible could not help wondering on occasion whether the students, however much they might welcome a free visit to England, would feel much enthusiasm for an intensive course in another system of law which had no connexion with the difficult examinations for which they were studying in Germany. These doubts were soon dispelled. At the outset of the first course there was indeed some reserve on the part of the students, which it subsequently appeared was due to the fear that they were going to be subjected to propaganda. They quickly realised, however, that they were being given a straightforward and uncoloured exposition of English law and the English legal system, and from then on they showed an interest in the course which was most gratifying. In succeeding courses there was not the same initial reserve: those who attended them had apparently been reassured by their predecessors as to the absence of propaganda. As an indication of the interest taken, it may be mentioned that, though the syllabus was a strenuous one, there were hardly any instances of a student missing a lecture or visit without proper excuse. Discussion at lectures and with the Tutors was always lively,

and the questions asked often showed not only that a student had given thought to a particular point but also that he had taken the trouble to look it up in textbooks in his spare time. The students made a real effort to grasp conceptions and procedures unfamiliar to them, and those responsible for supervising their studies considered that on the whole they succeeded very well in doing so.

That view is confirmed by the essays in which at the end of each course the students gave their impressions of it. Even when every allowance is made for the possible feeling that criticism would be discourteous, it is clear that the students regarded the courses as most successful. Very many of them testified to the way in which their minds had been stimulated and broadened both in legal knowledge and in the opportunities they had to get to know another country. The connexion between these two aspects was well expressed by one of them who wrote:—

> " If it has been the aim of our English hosts to show us the English legal system in order to make us better equipped to understand and consider critically our own law, then their efforts have been fully successful. But this success would have been less certain, if not altogether impossible, if our course had been confined to lectures and if these had been given in Germany. For to obtain a proper understanding it was essential that we could not only see how English law is being administered, but also that, in our " off-duty " hours, we could live amongst the English people and get to know their mentality."

What has been said above relates to the impression made by the courses at the time. It is somewhat too early to say whether the interest aroused was only temporary, but such information as is available indicates that it did not evaporate on the students' return to Germany. Thus, when in 1949 the Central Legal Office, the German body which until the establishment of the Federal Republic performed many of the functions of a Ministry of Justice for the British Zone, offered prizes for essays on subjects studied in England by those attending the earlier courses, nearly half of those eligible competed. All the essays submitted were of a high standard—it may be mentioned that extracts from the essay which won the first prize were published in the Law Society's Gazette in December, 1949. This essay showed a grasp of English legal administration remarkable in one who had made so relatively short a stay in this country. Another indication of the interest aroused was the eagerness of students who had attended the courses to share their experiences with other lawyers and of the latter to hear them. Many lectures by students were arranged and were very well attended. Again, some of the students have submitted theses for the degree of Doctor on subjects taken from English law. Finally, some of the students have made efforts to form an association with the object of keeping in touch not only with each other but also with English legal affairs.

Apart from these signs of interest being maintained, there has been evidence from some students of the practical benefits of studying another system of law and seeing it in operation; they have found that what they have learned abroad has helped them directly in their work at home. As one of them put it, " many things we can now understand better, and many things we shall make use of in our profession consciously or unconsciously." Besides what has been said by the students themselves, it can be added that both the British authorities in Germany and the German authorities are satisfied of the success of the courses in broadening the minds of the students and making them better equipped to influence in the future the development of the German legal system.

The results of the courses, so far as they can at present be ascertained, may therefore be summed up as follows. The courses were undoubtedly successful at the time in giving the students a grasp of the English legal system and in arousing their interest in it. There are indications that this interest is being maintained. Some at least of the students have found that their work here has been useful to them in their work in Germany. The consensus of opinion is that

their outlook has been beneficially broadened. These considerations give good grounds for hoping that the courses will achieve their ultimate object of fitting a representative selection of the best law students of the years covered by the courses to make in the future a valuable contribution to the re-establishment of the German legal system.

A few words may be added on a more general aspect. As has been seen, these courses were held for special reasons connected with the occupation of Germany. It is believed, however, that their interest is not limited to the illustration they afford of the efforts made by this country to help in the re-establishment of a democratic Germany. These courses may also have a more general interest in connexion with legal education in that they demonstrated that a relatively short but intensive period of study in a foreign country of its law could be not merely an academic exercise but a stimulating activity of real interest and value. Whether, as Mr. J. B. Leaver in the paper on Legal Education which he presented to the International Bar Association's London Conference last year suggested it should, the holding of these courses will encourage the holding, both in this country and elsewhere, of similar courses for foreign law students, remains to be seen. The practical difficulties in the way are formidable; but if any efforts are made to overcome these difficulties, those concerned will find in these courses a precedent which at least shows how such courses might be conducted and perhaps also gives grounds for the belief that such courses would serve a useful purpose.

DEDUCTION AND INDUCTION IN THE LAW OF TORTS: A COMPARATIVE APPROACH

[*Contributed by* N. S. Marsh, Esq.]

At first sight the English law of torts does not easily lend itself to a comparative treatment. "The law of torts," says Professor Gutteridge,[1] ". . . is characteristically English, and difficult to contrast with the relevant rules of the European codes." This sharp contrast appears to exist both in form and principle. As to form, it seems that what French law succeeds in compressing into five articles, Dutch law into sixteeen, German law into thirty-one, requires in Jenks's Digest a minimum of 300 articles.[2] As to principle, we may refer to Dr. Walton's article on " Delictual Responsibility in the Modern Civil Law,"[3] which, even if, as will be argued, over simplified, is still a useful introduction to the whole problem of delictual responsibility in English and Continental law. Dr. Walton contrasted the different histories and methods of the two systems with regard to delict. The Continental method, he said, starts from the Roman law; this, by the help of jurists such as Cujas, Dumoulin, Voet, Domat and Pothier, it has modified and developed to produce the broad general principles of liability, of which articles 1382-4 of the Code Civil are the outstanding examples. The English method, on the other hand, begins with particular remedies. " The law creeps on from case to case. The judges conceive that their business is to dispose of the case before them. So far as is possible they avoid laying down any more law than is absolutely necessary for this purpose."[4] Dr. Walton summed up his argument in the following way:—" In the Continental law we start with the principles and the cases are mere applications of them. In the

[1] Comparative Law, 2nd Ed., p.33.

[2] As pointed out by Lee, Introduction to Roman-Dutch Law, 4th Ed., p.821, note 1. But, as it is hoped to make plain in this article, such statistics are misleading. Apart from the necessity for elaborating the French articles by extensive judicial interpretation, the German Code is supplemented by proprietary remedies contained in the third book of the Code (e.g. nuisance and conversion in English Law), by special laws and by reference in a general clause to criminal and administrative law. See Cohn in Manual of German Law, H.M. Stationery Office, 1950, p.100 et seq.

[3] 49 L.Q.R. 70.

[4] Walton, op. cit., p.73.

English law, on the other hand, we start with the cases and get at the principles, if we can, afterwards, by a process of induction."[5]

Dr. Walton's article was a somewhat discouraging one for the comparative lawyer; for there is not much point in comparing systems of law unless they have a certain minimum of similarity. Indeed, it is a not entirely unfair criticism that his survey of special differences between French and English law leaves the reader in the air; we note the differences between the two systems but do not feel that we have been much helped to a critical judgment of either. Dr. Walton, however, was writing nearly 20 years ago, and since then new juristic writing and developments in the law, particularly of England, require reconsideration of Dr. Walton's conclusions.

(i) *The relative importance of legal principle and judicial discretion in the continental law of delict.*

Dr. Walton implied that, in contrast to English law, the Continental law of delict consists of a few comparatively simple but comprehensive principles of liability, sufficiently clear for the judicial function to be described as the " mere application " of those principles. We will test the truth of this statement, firstly with regard to French law (with which admittedly Dr. Walton was primarily concerned) and, secondly, with regard to German law. For both systems the order of treatment will be the same. We will first consider the alleged general principles of liability, and we will then test their adequacy both negatively and positively. By " negatively " we mean whether the principles make provision for those cases where, although damage has been caused, there is no liability. By " positively " we mean whether the principles cover all the cases of damage where there is in fact liability.

(a) French law.

Article 1382 of the Code Civil appears to establish liability for any sort of damage, physical and pecuniary, which has been caused by the " faute " of the defendant.[6] Article 1383 is somewhat obscurely worded,[7] but is generally taken to mean that such damage may be the result either of an act of commission or of an omission.[8] If we interpret " faute " as it is understood in ordinary speech with reference to human conduct, the Code seems therefore to lay down a simple rule of liability for all damage caused intentionally or negligently. These provisions are supplemented by Article 1384, which imposes vicarious liability on masters for damage caused by their servants and (subject to the possibility of rebutting negligence) on fathers or widowed mothers for damage caused by their infant children, as well as on workmen for damage caused by their apprentices.[9] Finally, strict liability is imposed in three cases:—On the owner or user

[5] Walton, op. cit., p.77.

[6] Art 1382. " Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

[7] Art. 1383. " Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence."

[8] It was at one time suggested that Article 1382 concerned intentional wrongs (*delits*) and Article 1383 unintentional wrongs (*quasi-delits*) but see now Planiol, Traité Elémentaire, Tome ii, 2e. ed., 1947, p.325.

[9] Art. 1384. " On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.

(L. 7 Novembre 1922). ' Toutefois, celui qui détient, à un titre quelconque, tout ou partie de l'immeuble ou des biens mobiliers dans lesquels un incendie a pris naissance ne sera responsable, vis-à-vis des tiers, des dommages causés par cet incendie que s'il est prouvé qu'il doit être attribué à sa faute ou à la faute des personnes dont il est responsable.

' Cette disposition ne s'applique pas aux rapports entre propriétaires et locataires, qui demeurent régis par les articles 1733 et 1734 du Code civil.'

' Le père, et la mère après le décès du mari, sont responsables du dommage causé par leurs enfants mineurs habitant avec eux ;

' Les maitres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés ;

of an animal for any damage which it causes whether in captivity or after it has escaped (Article 1385); on the owner of a building for damage caused by its collapse owing to defective maintenance or construction (Article 1386); on the user of an aeroplane for damage caused by its movement or by objects dropped from it (law of 31st May, 1924, Article 53).[10]

The simplicity of these provisions is deceptive. They are not, in the sense defined above, negatively adequate. There are causes where, although there has been intentionally or negligently inflicted damage, there is in law no liability. This is not inconsistent with Article 1382, because, although the word " faute " means in one sense " intention " or " negligence " (the *dolus* or *culpa* of Roman law), it also means simply " contrary to law "; and the article has to be interpreted in a way consistent with both meanings. If " faute " means " contrary to law," it is self-evident that the question whether there is or is not a " faute " is a question of law; this is now universally recognised, but the ambiguity latent in the word " faute " has caused considerable uncertainty.[11] With these considerations in mind, Professor Lawson states that " French lawyers have been brought to the point of acknowledging the need of something not very far removed from the English duty of care."[12] In this, however, he would seem unduly cautious. " Faute," meaning " contrary to law," pre-supposes, as Planiol says, " the violation of a pre-existing obligation."[13] There is no difference in principle between recognising the necessity in law of a " duty-situation "[14] and of a " pre-existing obligation," without which the intentional or careless infliction of damage is not actionable. On the other hand, the courts in the different countries may well differ in the "duty-situations" or "pre-existing obligations " which they are prepared to recognise. The point which we wish to emphasise is that in French, as in English law, the law of torts is not, as Dr. Walton argues, to be found in legislative principles but in judge-made law, from which the principles, if any, must be induced.

One naturally hesitates to equate the French insistence on " faute " as meaning " contrary to law " with the English requirement of a " duty of care," because some French authorities, Savatier[15] for example, assume that there is a general duty not to injure others, subject only to certain exceptions. " Faute " therefore will mean failure to observe the standard of conduct normally shown by a reasonable man, and its secondary sense of " breach of a pre-existing legal obligation " would be unnecessary in the ordinary case. French law, therefore, requires not so much a " duty of care " as a " privilege " or " liberty " to act, in Hohfeld's sense. But this view does not differ in effect from that which it purports to contradict, unless the exceptions to the alleged principles of general liability can be fixed. If the courts are free to vary the exceptions, it does not make a great deal of difference whether we say:—There is general liability for negligently or intentionally inflicted damage, subject to the power of the courts

' Les instituteurs et les artisans, du dommage causé par leurs élèves et apprentis pendant le temps qu'ils sont sous leur surveillance.'

(L.5 avril 1937). ' La responsabilité ci-dessus a lieu, à moins que les père et mère et les artisans ne prouvent qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité.

' En ce qui concerne les instituteurs, les fautes, imprudences ou négligences invoquées contre eux comme ayant causé le fait dommageable, devront être prouvées, conformément au droit commun, par le demandeur a l'instance.' "

[10] The liability is very strict and differs from other cases of strict liability—e.g. act of a third party is no defence. See Planiol, op. cit. (n. 8 supra) p.379. Cf. Air Navigation Act, 1949 ; Winfield's Textbook of Tort, 5th Ed., p.325.

[11] See Lawson's Negligence in the Civil Law, 1951, p.31. Rabut's monograph, " De la Notion de la Faute en Droit Privée," Paris, 1949, gives in an appendix (at p.200) an interesting selection of juristic definitions of " faute," in which the confusion arising from the failure to distinguish between its moral and legal aspects is clearly illustrated.

[12] Op. cit., p.31.

[13] Revue Critique de Législation et de Jurisprudence 1905, p. 277 at p.283.

[14] See Morison, 11 Mod. L.R. 1.

[15] Traité de la Responsibilité Civile, Tome I, 1939, Ch. 3

to introduce exceptions (no principle of exception being stated in advance); or, there is liability for negligently or intentionally inflicted damage in those cases where the court holds there is a duty of care. Savatier attempts therefore to fix his exceptions as follows:—Omissions, trade competition, defence of one's own or another person's interests (including the bringing of civil or criminal proceedings), the infliction of minor damage on one's neighbour, rights connected with freedom of expression, the infliction of damage under necessity. Clearly, not even this list is comprehensive; if we are to include such general defences as necessity, we must also mention the much more frequent defence of *volenti non fit injuria*.[16] But, in any event, Savatier's list, as it stands, covers a very wide field, leaving only a limited sphere of action for his alleged general principle. Moreover, his exceptions are vaguely defined and themselves subject to the doctrine of abuse of rights, which is itself far from precise.[17] With all these uncertainties, it is perhaps a little misleading to say that " regarded as a description of the limits of liability for negligence, it (Savatier's doctrine) is doubtless accurate enough," and it is something of an under-statement to add that " it seems to point to the conclusion that the duty of care in French law, if we may apply the English term, is by no means universal, and that on occasion an advocate may have to satisfy the court that the defendant's conduct is not merely careless but actionable."[18] Other authors insist that in *every* case of negligence there must be a pre-existing legal duty before its possible breach can be investigated. Thus, a recent monograph on the concept of fault says:—" Study of the cases (" la jurisprudence ") allows no doubt about the existence of the first element in fault; fault presumes the violation of a pre-existing obligation. The principle is sometimes stated in judgments, but above all, actual decisions approve it by their daily applications of it."[19] This insistence in all circumstances on a pre-existing obligation may be illustrated by reference to the treatment of omissions by the author we have just cited and by other French authorities. Professor Lawson says that " Savatier (and everyone else, for that matter) admits that there can be no liability for negligent omissions unless there is a duty to act ";[20] but what Mazeaud,[21] Esmein[22] and Rabut[23] in effect argue is that, as it is always a question of law whether a person ought to abstain or to act, there is no difference in principle between acts of commission and of omission. This does not mean that generalizations as to liability for negligently inflicted, physical injury by positive acts, or as to all damage if intentionally inflicted, are without value. They represent a rough approximation to what the courts have decided in past cases, and a reasonable prophecy of what they will do in the future, but French law is as yet unwilling " to leave to the unrestricted discretion of the finders of fact the decision as to what the reasonable man would have done in the circumstances,"[24] even as regards a particular type of injury inflicted in particular circumstances.

The provisions of the Code Civil with regard to delict are inadequate also in the positive sense; that is to say, there are cases of liability which are not provided for in the Code. The courts have by their interpretation of the words " by the act . . . of things under one's keeping " in Article 1384 developed a considerable doctrine of strict liability. The history and scope of this liability have been discussed at length by many authorities.[25] We are only concerned

[16] See Esmein 'Cours de Droit Civil Approfondi, Diplome d'Etudes Supérieures (Droit Privé), 1949-50, p.74, who puts it first in his list of cases where it is permissible or excusable to injure another.

[17] Esmein, op. cit., p.94 et seq ; Lawson, op. cit., p.16 et seq.

[18] Lawson, op. cit., p.32. [19] Rabut, op. cit. [n. (11) supra], p.26.

[20] 22 Tulane L.R., p.120. [21] Traité Théorique et Pratique de la Responsibilité Civile, Tome I, 4e. ed., 1948, p.515. [22] Op. cit. [n. (16) supra], p.57. [23] Op. cit. [n. (11) supra], p.27.

[24] Lawson, 22 Tulane L.R. p.130.

[25] E.g. Planiol, op. cit. (n.8 supra), p.359 and the bibliography there given. See for a useful short account, Morin's " La Révolte du Droit contre le Code," 1945, p.64 et seq. In English Lawson XXII J.C.L. 3rd ser. 150-158 and op cit. (n.11 supra) p.44 et seq.

to emphasize firstly, that this doctrine of strict liability has been created by the courts and, secondly, that it is very flexible, leaving the courts to decide from time to time in the light of social conditions what are " things under one's keeping " for which strict liability is imposed. A similar control over the analogous but narrower doctrine of *Rylands v. Fletcher* is retained by the English courts' insistence on the user of the land being " unnatural ".[26]

It is therefore very far from true that in French law we start with the principles and that the cases are mere applications of them. Esmein says almost the exact opposite:—" In reality the French law of civil responsibility is not codified. The Code Civil only contained the rudiments of law on this subject. Our law is case-law ("jurisprudentiel ") in the same degree as English law. It is still in the full phase of elaboration and an attempt to reduce it to detailed legislation would probably turn out to be defective."[27]

(b) German law.

Although Dr. Walton was writing primarily of French law, it would be true—or perhaps we should say less untrue—to describe German law as starting with principles, of which the cases are mere applications. It is certainly true that we obtain from the BGB a much more detailed picture of the general law of delict than is given by the comparable articles of the Code Civil. Certain torts, such as defamation (para. 824) or breach of a statutory provision [para. 823(2)], are dealt with separately in the BGB. Strict liability, which as we have seen is a flexible judge-made doctrine in French law, is either dealt with by specific paragraphs of the BGB [para. 836 (collapse of structures); para. 833 damage done by animals)], or by special laws [Law of 1871, as amended in 1940 (railway and tramway accidents); Law of 1909 (damage caused by mechanically propelled vehicles); Law of 1922 (damage caused by aircraft)]. Vicarious liability, which is a form of strict liability, is only recognized in German law to a limited extent (para. 831). Even the so-called " general clauses " imposing liability are very far from giving the courts discretion to hold responsible anyone who has negligently or intentionally inflicted damage. Under para. 823(1), " a person who, intentionally or negligently, injures unlawfully the life, body, health, freedom, property or any other right of another person is bound to compensate him for any damage arising therefrom." The categories of interest which are thus protected might have been stretched, by interpretation of the somewhat equivocal phrase " or any other right " to include any legitimately enjoyed interest and, in particular, a man's " total pecuniary interest " (" Vermögen "). In spite of considerable support for this view,[28] the dominant opinion, which has been accepted by the courts, is that para. 823(1) in effect excludes liability for purely pecuniary damage. It is true that the same restriction does not apply to the other " general clause," para. 826, whereby " a person who intentionally causes damage to another in a manner *contra bonos mores* is bound to compensate the other for this damage." But para. 826 is limited, for its part, to intentionally inflicted damage, although it would appear that a reckless disregard as to whether an act does or does not inflict damage will be more readily equated with an actual intention than in English law.[29]

How far do delicts, as defined in German legislation, in fact leave a measure

[26] See *Read v. Lyons* [1947], A.C. 156 at pp.169-70, 173-4, 176, 187.

[27] Op. cit. (n.16 supra), p.38.

[28] See Enneccerus, Lehrbuch des Buergerlichen Rechts, 2 Band, 2 Teil, 1950, p.881, para. 233 (footnote 2). The contrary view is convincingly argued in Enneccerus, op. cit., pp.881-3.

[29] Thus the Reichsgericht has held that an employee of a bank who, acting with gross negligence, has recommended a customer to purchase shares on the stock exchange at a price which shortly afterwards fell considerably is liable under para. 826 (RG in Warneyers Jahrbuch, 1935, p.236, no. 115—as cited by Cohn, op. cit. (n. 2 supra). Cf. in English law *De la Bere v. Pearson*, [1908] 1 K.B. 280, where negligently given financial advice was only made actionable by the introduction in a rather strained way of a contract, real consideration being absent.

of discretion to the courts to decide whether to exclude liability in the individual case? In para. 823(1) the word " unlawfully " (" widerrechtlich ") is not self-explanatory, but its importance should not be exaggerated.[30] It is true that it refers in the first place to the availability of certain legally recognized excuses, such as self-defence, necessity or *volenti non fit injuria*.[31] These defences would, however, be available even if the word " unlawfully " were omitted and their definitions give no wide discretionary power to the court. It is also sometimes said that " the conduct of the defendant must have been in breach of some duty imposed by law and whereas all positive acts infringing rights or the interests enumerated in para. 823 fall under that head, legal duties to act positively in protection of another's rights or interests are exceptional."[32] While there is no doubt that liability for omissions requires a special duty to act, this duty would seem to follow from the very nature of liability for omissions rather than from any statutory provision. If I say that I have caused my flowers to wither by omitting to water them, this sentence only has a significant meaning on the supposition that I have a greater obligation to water them than the rest of the world, e.g., the fire-brigade.[33] What is important to our argument, however, is that " unlawfully " (" widerrechtlich ") within the sphere of certain protected interests damaged by positive acts does not have the same equivocal meaning as " faute " in Article 1382 of the Code Civil. The courts are not left with a discretion within this sphere to declare that there is no legal duty, provided the damage has been negligently or intentionally inflicted.

It can therefore be said that, apart from the special case of omissions, the general principles of delictual responsibility set out in the BGB are negatively adequate, i.e., they themselves make provision for those cases where, although damage has been caused, there is no liability. They are also more adequate in a positive sense than French law, for there has been no purely judicial development of a doctrine of strict liability comparable to the interpretation given to Article 1384 of the Code Civil; strict liability has, as we have seen, been admitted in a limited number of cases which are enumerated either in the BGB itself or in special legislation. On the other hand, para. 826 with its vague requirements of *contra bonos mores* leaves much to the interpretation of the court. As Dr. Cohn says, " the courts have used para. 826 to build up a whole system of case law, mitigating, if not completely destroying, the rigidity of the BGB, supplementing the written law and adapting it to the needs of the times."[34] However, the requirement that the damage shall have been intentionally inflicted in effect reduces the importance of the powers of interpretation given to the courts. There is less likelihood of a discrepancy between the legal and the lay view of what is *contra bonos mores* with regard to intentional acts than with regard to unintentional acts.

(ii) *The Relative Importance of Legal Principle and Judicial Discretion in the English Law of Torts.*

In one sense the proposition that " in the English law . . . we start with the cases and get at the principles, if we can, afterwards, by a process of induction " is incontestable. The English law of torts is not codified; we can only reach its principle, if any, through the cases. In making a comparison with Continental law, however, what we wish to know is whether the principles are *ex post facto* rationalisations of decisions in fact made pragmatically from case to case, or whether the principles are genuine in the sense that they enable us to forecast the decision in cases not yet before the courts. We may omit the

[30] See e.g. Lawson op. cit. (n. 11 supra), p.30, and Enneccerus, op. cit. (n. 28 supra), p. 888.

[31] See Enneccerus, op. cit., para 231, pp. 875-879.

[32] Lawson, op. cit., p.30.

[33] See Esser, Lehrbuch des Schuldrechts, Verlag C. F. Mueller, Karlsruhe, 1949, para. 94, p.94.

[34] op. cit. (n. 2 supra), p.104.

cases of strict liability from our enquiry, for we can hardly hope to link by a common principle liability under the rule in *Rylands v. Fletcher*, liability for cattle trespass, for animals under the *scienter* rule, for some cases of conversion and for defamation. As to negligently or intentionally inflicted injury, the question is to what extent English law is " prepared to admit that a man must in all circumstances take or refrain from such activity as a reasonable man would take or refrain from to avoid physical or pecuniary damage to anyone else, and, what is more, to leave to the unrestricted discretion of the finders of fact the decision as to what the reasonable man would have done in the circumstances."[35]

Professor Lawson has put forward the tentative opinion that the duty of care is tautologous—i.e., coincides with the factual question, did the defendant behave reasonably in all the circumstances?—at least as regards physical damage caused by positive acts; he suggests that other sorts of damage require proof of a special duty.[36] Thus, in effect, he places English law between French law, with its universal insistence on " faute " as a legal requirement, and German law, which generalises the duty to avoid physical damage by acts of commission, but which does not allow any action at all for negligently caused pecuniary damage. In following in the main this thesis, we venture in some respects to qualify it and in others to elaborate its argument.

It is doubtful in the first place whether we can yet speak of English law as having accepted a general duty of care within a restricted sphere, even if the cases all point to this conclusion. The results of the cases may be consistent with the particular theory and may enable a lawyer to give in most cases a pretty shrewd guess as to how a future case will be decided. But it is remarkable how often the sort of reasoning in which we might hope to find general principles turns out on examination to be either too wide (being often qualified in the same judgment)[37] or a mere disguise for stating no principle at all.[38] It would seem that the subtle transformation in thinking about negligence from individual duty-situations to general principles, although in progress, has not yet reached a stage in which judges can be relied upon to say:—" Has the defendant behaved reasonably? If not, is there any special legal reason why he should not be held liable?"[39]

The second qualification in Professor Lawson's thesis concerns the exceptions which have to be made to any general theory of negligence. The non-liability of a lessor or vendor of a house for damage caused negligently to his tenant or purchaser or to anyone else coming upon the premises[40] is only one of a number of exceptions concerning land. The others are perhaps more important, because they tend to be taken for granted, whereas the *Bottomley v. Bannister* type of case is generally recognised as an anachronism. Thus while it may be possible to re-state the liability of an occupier of land towards an invitee in terms of a general duty,[41] the same duty cannot be applied to the occupier as regards

[35] Lawson, 22 Tulane L.R. p.130.

[36] Op. cit. (note 11 supra) p.36.

[37] Cf. Lord Atkin in *Donoghue v. Stevenson*, [1932], A.C. 562 at p.580 (the good neighbour test) and at p.599 (Liability limited to a manufacturer of products for injury to the consumer's life or property).

[38] See Evershed, M.R. in *Denny v. Supplies and Transport Co. Ltd. and Scruttons Ltd.*, [1950], 2 K.B. 374 at pp.379-380, where he speaks of principles becoming " gradually established " as from time to time cases come before the Court.

[39] R. S. Wright J. in *Wilkinson v. Downton*, [1897], 2 Q.B. 57, is a remarkable exception, considering the date of the judgment.

[40] E.g. *Cavalier v. Pope*, [1906], A.C. 428 ; *Bottomley v. Bannister*, [1932], 1 K.B. 458 ; *Davis v. Foots*, [1946], 1 K.B. 116 ; *Travers v. Gloucester Corporation*, [1947], 1 K.B. 71.

[41] The difficulty here is that the judge does not allow the jury (or will not allow himself as a judge of fact) to be satisfied with the defendant's excuse that he left the matter to an independent contractor, unless he can show care in choosing, supervision, as far as the nature of the task permits, and reasonable care to detect dangers afterwards. See *Woodward v. The Mayor of Hastings*, [1945], 1 K.B. 174.

licensees or trespassers.[42] The favoured position of the occupier of land is also to be seen in the absence of a duty on him to prevent his animals straying on to the highway.[43] It is true that usually the failure to take care will be an act of omission, and hence would in any event fall outside our proposed general duty. But if the occupier of a field cuts down his hedges, knowing there are cattle in the field, he would have acted, not have failed to act; yet apparently he would not be liable. Finally, under the " land exceptions " we must place cases of the *Mayor of Bradford v. Pickles*[44] type. If Mr. Pickles had dug his wells without the intention to injure, but in circumstances in which any reasonable man would have foreseen the possibility of injury to his neighbours, *a fortiori* he would not have been liable. It might be said that the damage in *Mayor of Bradford v. Pickles* was a mere pecuniary loss, but would the result have been different if Mr. Pickles had built a large building on his own land, overshadowing a neighbour's market garden so that the fruit failed to ripen? Or if, on similar facts to *Mayor of Bradford v. Pickles,* the drawing off of the water flowing through undefined channels had caused crops on the neighbouring land to wither and sheep to die of thirst?

It would seem desirable to elaborate Professor Lawson's thesis with regard to intentionally caused damage, for, if there is to be a general liability for physical damage caused by negligent acts of commission, it can hardly be denied that intentional acts of commission inflicting physical damage must be similarly treated. The American Restatement does in fact impose liability in such cases.[45] If we pursue the enquiry a little further and ask whether, in a way comparable to para. 826 of the BGB, English law recognises a general duty to avoid *all* sorts of intentionally inflicted damage, we run however into difficulties. Pollock cited with approval a dictum of Bowen, L.J., in *Skinner & Co. v. Shew & Co.*,[46] to the effect that " at Common Law there was a cause of action whenever one person did damage to another, wilfully and intentionally, and without just cause or excuse." The statement may be questioned on historical grounds, although this seems a somewhat sterile objection if, in fact, it does now represent a working principle of the courts. Mr. Landon[47] considers that any such general test of liability was ruled out by the decision of the House of Lords in *Mayor of Bradford v. Pickles*.[48] But the actual decision on the facts in that case can be explained, as we suggested above, by reference to the special concern of the English Common Law for the rights of the occupier of land. Nor are the judgments inconsistent with that approach. Lord Halsbury's well known dictum, " if it was a lawful act, however ill the motive might be, he (the defendant) had a right to do it,"[49] leaves open the question, what is meant by a " lawful act ". From the context he was clearly referring to a man's rights over land. He is far from saying that it can never be tortious to do intentionally anything causing damage which without such intention would not be actionable. Lord Watson speaks of " legal user of property"[50] to the same effect. Lord Ashbourne speaks of "Mr. Pickles's legal right " as being unaffected by bad motives;[51] here the question is, what is meant by legal right. If it could merely mean that the law has given Mr. Pickles an absolute right to dig wells on his land, irrespective of his motive in so doing, it could be equated with Lord Halsbury's " lawful act ". Similarly, Lord

[42] E.g. *Fairman v. Perpetual Investment Building Society*, [1923], A.C. 74 ; *Jacobs v. L.C.C.*, [1950], A.C. 261.

[43] E.g. *Searle v. Wallbank*, [1947], A.C. 341.

[44] [1895], A.C. 587

[45] See Re-statement, Torts Section 18, Section 158 and Section 218.

[46] [1893], 1 Ch. 413 at p.422.

[47] Pollock's Torts, 14th ed., Excursus A, p.44.

[48] See n(44) supra.

[49] S.C. at p.594.

[50] S.C. at p.598.

[51] S.C. at p.598.

Macnaghten's remark that " the real answer to the claim of the corporation *in such a case* is that motives are immaterial "[52] becomes unobjectionable if by the words in italics we understand a case concerning a " legal right " or a " lawful act ".

More difficult to explain away is *Allen v. Flood*.[53] The number and length of the judgments in that case have however discouraged detailed consideration of its significance, and it has been rather too readily accepted as authority for the proposition that unless the requirements for some other cause of action, such as conspiracy, are present, mere bad motives (and presumably *a fortiori* mere intention to injure) will not make actionable what, without such motives or intention, would not be actionable.[54] On the facts it is easy enough to explain the decision in the same way as we dealt with the *Mayor of Bradford v. Pickles;* that is to say, English law recognises certain rights of an indefeasible nature where it refuses to investigate or question the motives with which they are exercised. A landowner has such a right to dig wells on his own land and thereby to drain off the water flowing through undefined channels on to his neighbour's land; a man has such a right in pursuance of trade competition or trade union activity to persuade others to terminate (without breaking) contracts which they have made with third parties, even though thereby the third parties suffer damage. If we examine the actual judgments, however, we find that the judge of first instance and the Court of Appeal were in favour of gaving an action to the dismissed men—i.e., did not even admit a limited indefeasible right. Of the eight judges who were asked their opinion by the House of Lords, six agreed with the judge of first instance and the Court of Appeal. Of the Law Lords three[55] dissented, being in agreement with the lower courts. Of the remaining six, four in their judgments were not inconsistent with the theory of specific indefeasible rights which we have discussed above. Lord Shand is, in this connection, particularly interesting, for he repeats[56] Lord Watson's remarks as to " user of property " in *Mayor of Bradford v. Pickles* and then goes on to say that the same principle applies to rights of competitors in trade and to the present case (i.e., trade union activity). It is true that Lord Herschell is responsible for the well-known dictum:—" It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive which dictated it."[57] But this should be explained in the light of the later dictum:—" *Mayor of Bradford v. Pickles* is applicable not only to rights of property, but is equally applicable by an individual to his other rights."[58] Lord Herschell, therefore, in speaking of " acts *prima facie* lawful " may have meant " indefeasible rights ". Lord Macnaghten did not in any event think that the defendant had induced the dismissal of the plaintiffs and the status of his remarks on the law is therefore questionable. What he actually said was:—" I do not think there is any foundation in good sense or authority for the proposition that a person who suffers loss by reason of another doing or not doing some act *which that other is entitled to do or abstain from doing at his own will and pleasure, whatever his real motive may be,* has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the damage comes, even though it could be proved that such a person was actuated by malice towards the plaintiff, and that his conduct

[52] S.C. at p.600.

[53] [1898], A.C.1.

[54] See Salmond's Torts, 10th ed., p.27. " A bad motive does not make wrongful an act otherwise legal. " This proposition is only unobjectionable if by " legal " we understand an act which a man has a legal " right," as distinct from a " liberty," to do.

[55] Lords Halsbury, Ashbourne and Morris.

[56] S.C. at pp. 167-8.

[57] S.C. at p.123.

[58] S.C. at p.124.

if it could be enquired into was without justification or excuse."[59] That part which we have put in italics makes the whole statement a self-evident proposition; he says no more than that acts which may be committed or omitted without regard to motive do not become actionable merely because the defendant has a bad motive. Lord James of Hereford kept his decision within narrow grounds; he denied " on grounds of great inconvenience and injustice " an action against A for soliciting and persuading B not to enter a contract with C.[60] There remain only Lords Watson and Davey, who were prepared to deny that a bad motive could ever make actionable an act not in itself wrongful (as distinguished from an act which a man has a " right " to do).[61]

Even if it were not possible to explain away most of the judgments in *Mayor of Bradford v. Pickles* and *Allen v. Flood,* it may be doubted whether these cases could ever be accepted as authority for the proposition favoured by Lords Watson and Davey. It is only necessary to consider a hypothetical case to see its difficulties. We may take the facts of the contemporary case of *Earl v. Lubbock*[62] and for the negligently fixed wheel substitute one which has been so fixed for the express purpose of causing the accident. On these facts we should, on Lord Watson's and Lord Davey's showing, have to deny any civil action against the repairer even though he might be guilty of a serious criminal charge; for in the undeveloped state of the law of negligence at that time the negligent fixing of the wheel was not " wrongful " or " illegal ".

The real objection to a generalized liability in English law for all kinds of intentionally caused damage is not to be found in the cases which have so far come before the courts. Cases where there is no liability can be treated, as they were by Pollock, as exceptions. The real question is whether the judges are to have a discretion to introduce fresh exceptions (which dissolves the certainty of the alleged principle of liability) or whether the only issue in each case is one for the finders of fact. Here the comparative approach is helpful; not even Para. 826 of the BGB deprives the judges of a legal discretion, as they have to decide in each case what is " contra bonos mores ". Liability for the infliction of pecuniary (as distinct from physical) damage raises delicate questions of the economic and social balance, which may be answered differently at different times and in different countries. Thus, in German law where A, carrying out a preconceived plan, persuades B's agents in a considerable number of districts to leave B's service and thereupon appoints them to his service in competition with B, A will be liable under para. 826;[63] in English law, short of conspiracy, there would be no liability. Such differences suggest that the determination of absolute rights should here remain a matter of judicial discretion, in other words that a duty of care must be shown where the damage, even though intentionally inflicted, is purely pecuniary.

(iii) *Summary and Conclusions.*

1. The Continental law of delict appears at first sight to have little in common with the English law of torts, the former being based on general principles, the latter on individual cases with only a limited measure of general principle, which must be obtained by a process of induction.

2. The dissimilarity is misleading, both as regards the adequacy of general principles in Continental law and as regards their inadequacy or absence in English law.

3. In French law liability for intentionally or negligently inflicted damage, as well as strict liability, are not comprehensively defined by the Code Civil, leaving only an issue of fact in each case. Under Article 1382 the word " faute "

[59] S.C. at p.151.
[60] S.C. at p.178.
[61] S.C. at pp.92 and 172.
[62] [1905], 1 K.B. 253.
[63] RGZ vol. 149, p.114.

means " contrary to law " as well as " intention " or " negligence " and thus leaves the court free to decide what situations are " contrary to law " (" duty-situations " in the English sense). Similarly under Article 1384 the phrase " chose sous sa garde " leaves a wide discretion to the court as to the objects involving strict liability.

4. Attempts to generalize the duty of care in French law by admitting certain exceptions break down owing to their number and vagueness, and to the persistent way in which the courts and legal writers continue to insist in all cases (not merely, for example, as regards omissions to act) on the necessity for a " pre-existing obligation "—i.e., a duty of care.

5. In German law, as far as damage inflicted by a negligent or intentional act of commission is concerned, where such damage is physical (life, body, health, freedom or property of another) there is a general liability, judicial discretion being waived; the only question in each case is one for the finders of fact [para. 825(1) of the BGB]. Omissions, however, require proof of a special duty; and strict liability is defined either by the BGB or by special legislation, giving little scope for judicial discretion.

6. Intentional injury to purely pecuniary interests has in German law to be " contra bonos mores " in order to give rise to liability. We cannot, therefore, speak of a general principle to avoid intentional pecuniary damage, as the power to create such liability is a flexible one at the discretion of the court.

7. In English law the cases are not inconsistent with a general duty to avoid physical damage by negligent acts of commission, but so far the courts generally act as if in each case they had a discretion to decide whether there was a duty of care.

8. If the English courts are to act on such a general principle it will be necessary to admit (or to abolish by legislation) certain exceptions relating to land:—(a) the exception from liability of the vendor or lessor of defective premises; (b) the privileged position of the occupier vis-à-vis licensees and trespassers; (c) the exemption of the occupier from liability for cattle straying from his land on to the highway; (d) indefeasible rights over land as in *Mayor of Bradford v. Pickles*.

9. *A fortiori* the principle of liability for physical damage will apply in English law to intentional acts. But it seems inadvisable to seek with Pollock a general principle of liability for intentional acts giving rise to purely pecuniary damage. The reason is not to be found in such cases as *Mayor of Bradford v. Pickles* and *Allen v. Flood*, which can be explained as exceptions to the general rule (protection of the occupier of land, acts in furtherance of trade competition or trades union activity), but is that such pecuniary damage raises delicate questions of the social and economic balance, where judicial discretion and consequent flexibility of the law are more important than certainty.

FRENCH AND ENGLISH CRIMINAL LAW

[*Contributed by* E. R. Guest, Esq.]

There cannot be anyone now practising in either branch of the legal profession in England who had not both Stone's Justices' Manual and Archbold's Criminal Pleading, Evidence and Practice to assist him in criminal work from the day of his call. Indeed, untidy and uncodified as our criminal law may be, it has almost always been adequately served by text books. France, on the contrary, though for long in enjoyment of a criminal code, seems to have been left without any suitable practitioners *vade mecum* (though there were plenty of works of great detail and enormous scholarship) until the publication about 1925 of the first edition of M. Francisque Goyet's " Précis de Droit Pénal Spécial." Not unnaturally this proved extremely useful and popular, and by 1950 a sixth edition had become necessary, and was published by the Recueil Sirey, Paris, under

the editorship of Dr. Marcel Rousselet and Dr. Maurice Patin. The book, of which the price, perhaps mercifully, is not stated, now consists of iv and 668 pages, each formidably uncut and each provoking thought and comparison with our own criminal law.

The first general difference that the reader notices is that no kind of distinction between indictable and non-indictable offences enables the editors to omit from their consideration those minor offences that here would be discussed in Stone and ignored in Archbold. Thus begging, which is to all intents and purposes an entirely summary matter here, has to be dealt with in paras 201-205 of the Précis, as (under the delightful heading of " Colombophilie ") has the protection of carrier pigeons in paras 954-960.

On the other hand, with excellent logic, the précis remains a précis of criminal law in the strictest sense, and does not deal in any way with those questions of evidence and procedure which are the most valuable parts of both Archbold and Stone. These matters, though, by reason of the French system of preliminary judicial investigation, do not play so large a part in French practice as in the English courts. Nor does the work deal with the special rules of Juvenile Courts, to which so much attention has been and is being given in France, as readers of the excellent Revue de Science Criminelle et de Droit Pénal Comparé will know, nor with probation in its guise of the reprieve and the suspended sentence. Here, therefore, are exclusively a series of careful definitions (from the code and the more important laws and interpretations) of those acts which are in France crimes, and a statement of the sanctions provided.

Considering the great length of time during which the two societies have had no political connection, it is surprising how " at home " an English lawyer almost at once feels with the statement of each French crime. There is no doubt that until the Russian revolution all western communities considered it axiomatic that the state owed certain fundamental duties of protection to the property and person of each citizen, and as economic development was approximately contemporaneous in France and England, arrived perhaps of necessity at the same kind of definitions of breaches of duty to man and his goods. Thus the safety of a man's person is secured in both systems, at various stages of his existence by sanctions against abortion (ss. 429-438), infanticide (s. 406), killing or injuring by negligence (ss. 446-450), intentional battery and wounding (ss. 411-414), rape (ss. 484-5) and murder (400-405). Of these, only murder differs at all markedly from its English counterpart, and even then in the field of sanction rather than of definition. Simple murder in France is punished by life imprisonment, and consists of the doing of some positive act of a nature to produce death in the victim. Negligent omission will not constitute the crime (401). But if the murder is accompanied by circumstances of aggravation, the crime is elevated to that of " assassinat " and becomes punishable by death. Some of the circumstances which have this effect will be of particular interest to those English lawyers who, at the recent enquiry into capital punishment, urged the introduction of degrees of murder. Thus killing with premeditation or after torture or other acts of savagery or in pursuance of some other crime such as robbery all elevate the offence to " assassinat." More surprising to English ideas is the fact that the status of the person killed can also have this effect. To kill a public functionary or a parent by whatever means or in whatever circumstances is defined to be the more serious form of the offence. It would be interesting to discover the percentage figures of executions for " assassinat " over the last hundred years, and also the number of convictions for simple murder in France, and to compare both the separate figures and their total with the English figures (on a percentage basis) to see whether any pointer is given to the effectiveness of the unvarying as opposed to the varying sanction.

The liberty of the person is secured in France, by a sanction equivalent to penal servitude (as it once was), against wrongful arrest and detention, just as here such actions would be common law misdemeanours. (ss. 465.)

Peace of mind is secured by sanctions against threats (423-426) and, in a public place, against conduct outraging public decency. (470-474.)

In fact the only striking distinctions between the two systems concern the control of sexual behaviour. In France it is not an offence to commit homosexual practices with adult males in private nor, more surprisingly, does incest seem to have been defined as a crime *per se*. In this country homosexual intercourse has been a felony since Feudal times and those who do not approach the matter from religious, moral or aesthetic angles think for purely Feudal reasons. Incest, of which the danger must be obvious from any angle of consideration, was, oddly enough, not a crime even here until 1908, and one wonders whether its absence from the French code witnesses a striking purity of family life at all social levels or a failure to appreciate medical opinion of the fruits of the practice.

The same general similarity exists where the protection of property is concerned (see ss. 630 to 876). Larceny, however, provides some amusing reflections. The French *definition* (631) pays no attention to the moment at which the intention to deprive the owner of the article taken is formed nor to whether it is intended that the deprivation shall be permanent. There are four elements to the French definition. There must be a taking, it must be fraudulent, the thing taken must be moveable and it must be the property of someone else. This simple definition accords with that desired by many English lawyers, who, pointing to cases like R. v. Riley, R. v. Middleton and R. v. Hudson argue that the strict insistence of the Larceny Act upon the formation at the moment of taking of an intention permanently to deprive the owner of his goods has unnecessarily complicated the law of theft and enabled a good many dishonest actions to escape their just deserts. It has been suggested that any taking which was both fraudulent and *invito domino* should be larceny. Nevertheless there seems to be something about the concept of turning an innocent receipt into a theft on the ground of a fraudulent intention formed after that receipt which judges cannot stomach even when so wide a definition is indeed the law of the land. Two judgments of the Cour de Cassation have decided that this will not do. Thus, where a debtor owing 50 francs remitted 500 to his creditor and the latter, having opened his letter and perceived the situation, kept the lot it was held not to be an offence at all. Similarly, when an individual received by post a valuable security which was not intended for him at all and kept it, the Court was of opinion that this was not theft. (s. 632.) Thus the ironical position is that in England this latter state of facts has by the (some think) tortured manipulation of the doctrine of trespass been erected into theft because it is manifestly dishonest though not obviously within our definition of larceny (R. v. Hudson), but in France, where it would fit into the definition, it has been held not to be theft, presumably because the taking and the fraudulent intent are not contemporaneous in time. The mere occurrence of this oddity only serves to emphasise the similarity of thought animating the jurists of both nations.

As one would expect, it is the laws as they affect the structure of society that differ markedly from each other. By and large, English law is the same for all. That is not to say that it makes no difference to a man's chances of successfully defending criminal proceedings that he has the means to buy the ablest advice and advocacy. But it does mean that the definition of any crime and the sanction for it do not vary according to whether the victim or the actor is a public functionary or a private individual. In France the exact contrary is true. It has already been seen that the degree of murder will vary if the victim is a functionary or a parent. But so, speaking generally, will the gravity of most crimes and consequently their sanction if the perpetrator is a public official. (s. 112.) To balance this, a range of sections in the Code Pénal defines special offences designed to preserve both the safety and dignity of citizens charged with public duties in the exercise of those duties. (ss. 183-192.) The safeguards condescend to details: thus it is an offence to make a gesture at a civil servant suggesting that he should be wearing a pair of horns (or so the Court at Besançon

decided on 31 Dec., 1903) (s. 185), and one learns with relief that to spit on a magistrate amounts to violence to a functionary. These laws seem to have created a sort of " contempt of state servant ", comparable in definition though not in sanction to English contempt of court. To some degree the sections extend to defamation or vilification by the press (ss. 190-192), though nobody accustomed to the tone of French journalism would credit this. Whether these have been useful sections of the French criminal law it would be hard to say. The traveller's impression is that French civil servants are not held in any greater esteem than ours nor approached or treated with greater veneration. But then one cannot tell what would have been their plight if the cynicism and practicality of the average Frenchman, so far exceeding ours, had not been in some degree restrained by enactments of this sort. The increased severity of sentence which may be visited on a defaulting state servant though not provided for in theory in English law largely exists in fact. A policeman who burgles, a solicitor who embezzles or a postman who steals letters, though not by statute liable to any heavier penalty than anyone else, will in practice receive a much larger sentence from the superior courts than anyone committting these offences from a humble and private position, especially for the first time.

In spite of the anti-clerical nature of French society, adultery has been made a crime by the Penal code. (ss. 491-503.) As used to be the case in the English law of divorce, mere adultery by a wife constitutes the offence, whereas more has to be proved against the husband. For his extra-marital intercourse to constitute a crime it must be committed within the matrimonial home and be more than an isolated act. (493.) Not unnaturally the only people competent to launch prosecutions for this offence are the respective spouses, and the most ample provision has been made for such actions to be withdrawn by the complainant at any stage. Embarrassingly, the sanctions vary. A wife may be imprisoned for not less than two months nor more than two years, whereas the maximum for a husband's offence consists in fines. This is not a happy example of French criminal jurisprudence, and points to the influence of women in French society being either less, or less feminist, than one would have supposed.

Reading this excellent book exposes one of the weaknesses of codification. If you allow your criminal law to grow haphazardly out of practical experience, as English criminal law has largely grown, it may not be logical but it will at least be practical. Codifying is, however, a logical exercise, and does seem sometimes to lead to the constitution of certain crimes which are certainly necessary for logical completeness but may be neither convenient nor normally capable of proof. A very excellent example of the former type is the question of privilege. Nothing could be more illogical than the English law of privilege, confined as it is to lawyers and lawyers alone, and, even in their case, within the narrowest possible limits. Everyone knows that there are many other professionals who are necessarily the recipients of confidences without which society cannot work well, particular instances being doctors and priests. The dilemma facing the sociologist is that whereas in civil matters it is usually desirable that these confidences shall be respected, sometimes in criminal matters society cannot afford this protection. English law solves the problem by pretending it does not exist. Nobody has privilege before any court (other than a lawyer), but by and large unless the interests of society absolutely demand disclosure the sentiment of Courts is so strongly against pressing such persons as doctors and priests that they are rarely bothered. French law, with its civil and criminal codes, has been tempted to the other extreme, and indulged in too much definition. (ss. 573-578.)

Thus an enormous list of persons forbidden under penalty to disclose information obtained in the course of their professions has been drawn up, including midwives and bankers (575), and a correspondingly profuse list of occasions has had to be defined on which the law not only absolves such people from observing this law but actively compels them to disclose this very informa-

tion. (577.) Thus one arrives at the absurd refinement that doctors have to have special exemption from the law of professional confidence before they are able, without fear of penalty, to report notifiable infectious diseases to the proper health authorities. It must become correspondingly difficult for French professional men to understand their position in such matters without resort to legal advice.

An example of the latter type of crime seems to appear in s. 269. In every society it obviously should be an offence to bring false witness to accuse anyone. (One says " should " and not " must " because in eastern Europe to-day this action seems to have become a respected principle of government.) Therefore to a logical mind it no doubt ought also to be an offence to fail to bring true witness to the innocence of an accused. And this is just what the Code Penal has provided, though how this offence can ever be proved is a mystery.

But perhaps the most amiable weakness of any code is its inevitable tendency to falsify its own generalisations. In 1791 a law of 2nd-17th March proclaimed to a reactionary world that every French citizen was free to carry on such business or exercise such profession, art or skill as might seem good to him. Since then, as s. 769 points out, French law has found it desirable to regulate closely the entry into and the exercise of a very great number of trades and professions varying from doctor to ski instructor. (s. 770-793.) This tendency has of course intruded itself here, and is a reminder that theory is one thing and necessity another. It is sobering to observe that though we think we are the masters of our legislative fate, the same economic and historical pressures tend to squeeze out the same laws in any community. In 1936 in this country the constant disorders in street and meeting caused by the activity and antipathy of Fascist and Communist groups led to the passage of the Public Order Act of that year. In France exactly the same causes produced almost exactly the same law on 10th January, 1936. (s. 41.) The extensive series of Defence Regulations concerning exchange control and currency that were promulgated here during the war are matched by décret-lois to the same intent in France. (ss. 51-55.) Very possibly if this country had suffered an enemy occupation as did France from 1940, we should have had laws similar to that which in August, 1944, dissolved collaborating groups and decreed appropriate sanctions against those who had been members. (s. 42.)

Comparisons, like figures, can prove almost anything, but the exercise is mentally refreshing. This admirable volume will tempt any lawyer to speculations analogous to those in this note and doubtless the conclusions will be as various as the readers. But few can fail to conclude that the two most liberally minded communities in Europe, developing in entire political separation, have arrived at almost exactly the same conclusions as to how far to protect individual rights and how free the grim aftermath of two immense wars will allow the ordinary man to be.

FOREIGN CUSTODY ORDERS

[*Contributed by* Dr. Erwin Spiro.]

In many legal systems, particularly, but not exclusively, if seized of a matrimonial cause, the Courts are competent to make custody orders in respect of minor children, which either elevate one of the spouses to the position of a so called custodian parent or award the custody to a third person, thereby granting or denying the right of reasonable access to the non-custodian parent.[1] The Court which makes such an order, is usually also entitled to vary it on good cause

[1] Spiro, Law of Parent and Child, Cape Town and Johannesburg, 1950, pp. 6 et sqq. pp. 169 et. sqq. and pp. 194 et sqq.

being shown,[2] but has another Court, or even a foreign Court, jurisdiction to do so?

The effects of a foreign custody order, arising out of a matrimonial cause, came up for decision in the recent case of *McKee v. McKee*,[3] which deserves special interest, more especially because it was decided by the Privy Council.

The parties, who were both American citizens born in the United States of America, and had entered into an agreement, providing, *inter alia*, that without the written permission of the other party neither of them should remove their infant son from or out of the United States of America, eventually obtained a divorce in the State of California. The divorce decree awarded the custody to the father. The Court of the matrimonial cause subsequently reversed the custody order by awarding full custody to the mother with the right of reasonable visitation allowed to the father; the latter was also permitted to have the infant in Port Austin, Michigan, until Sept. 1, 1945, on which date it was ordered that the infant be delivered to the mother in Los Angeles, California. The order began to operate only with effect from Jan. 13, 1947, and a few weeks before that date, the father left for Ontario (Canada) with the child. As soon as this came to the notice of the mother, she instituted *habeas corpus* proceedings in Canada, seeking to have the child delivered to her, but the sole custody of the son was again given to the father. The custody order was confirmed by the Court of Appeal and, notwithstanding a reversal by the Supreme Court of Canada, also by the Privy Council.

The main questions which emerged from those facts were these:

(i) There being a custody order made by the Court of the matrimonial cause in whose jurisdiction the minor in question no longer resided, could another Court, more particularly a foreign Court, in whose jurisdiction the said minor now resided make a different custody order?

(ii) If so, were there sufficient grounds for doing so?

I. THE PROBLEM OF JURISDICTION

At the outset it had to be ascertained whether, in the premises, the Courts of Ontario had jurisdiction.

The divorce was decreed by an American Court, but there was no allegation that the father—and therefore also his minor son[4]—was domiciled in Ontario or that he or his son had lost American citizenship.

The Privy Council refrained from considering the question whether the Courts of the country of the minor's domicile[5] or of the minor's nationality[6] or of the matrimonial cause[7] had either concurrent or exclusive jurisdiction. The infant was in Ontario and, therefore, " within the King's allegiance." This was a sufficient ground to entitle the infant " to the protection of his Courts . . . owed by the King as *parens patriae* to infants."[8]

[2] See e.g. sect. 5 of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27) and sect. 3 (4) of the Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45). There must be evidence of fresh circumstances because otherwise the principle of *res judicata* applies, see *R. v. Middlesex Justices, ex parte Bond* [1933] 1 K.B. 72 and [1933] 2 K.B. (C. of A.) 1, at p. 9 per Scrutton L.J. ; *Burman v. Woods*, [1948] 1 K.B. (C. of A.) 111, at p. 114, per Somervell L. J. See also Eversley's Domestic Relations, 5th ed., London, 1937 p.439 and Spiro, op. cit., pp. 198-200 and pp. 230-32.

[3] [1951] A.C. 352 (Lord Merriman, Lord Simonds, Lord Morton of Henryton, Lord Radcliffe and Lord Tucker, judgment of their Lordships delivered by Lord Simonds).

[4] See my article in the International Law Quarterly, 1951, pp. 192-202.

[5] See e.g. American Law Institute, Restatement of the Law of Conflict of Laws, St. Paul, 1934, sect. 146 and Spiro, op. cit., p. 290 ad notas 43 and 44.

[6] As to the attitude of English Courts in respect of infants who are British subjects, see e.g. *In re Liddell's Settlement Trusts*, [1936] Ch. 305.

[7] Dicey, A Digest of the Law of England with reference to the Conflict of Laws, 6th ed. London, 1949, pp. 222, 431 (but see also p. 372 *ibidem*) and Spiro, op. cit., pp. 289-92, particularly p. 291 *ad notam* 50 and p. 292 *ad notam* 55.

[8] *McKee's case* (see supra note 3), at p. 360.

It can indeed not be denied that the Court as upper guardian of all minors is competent to protect an infant within its jurisdiction.[9] But if the requirements of a general custody order differ from those obtaining in a matrimonial cause, as e.g., in South Africa where the Court has a wider discretion in a matrimonial cause,[10] it may very well be that the jurisdiction of the Court, based on the residence of a minor, extends only to the general powers possessed by the Court in its capacity as upper guardian.[11]

II. THE PROBLEM OF THE RECOGNITION AND ENFORCEMENT OF A FOREIGN JUDGMENT

If, then, the Courts of Ontario had jurisdiction in the matter, it still fell to be decided whether or not they were bound by the custody order of the American Court of the matrimonial cause. In other words, the problem of the recognition and enforcement of a foreign judgment presents itself.

(1) A Preliminary Question

According to the English Conflict of Laws two ways are open to a person who has been a successful plaintiff in a foreign Court of Law: he or she may either sue on the foreign judgment or, while abandoning it, institute new proceedings based on the original cause of action.[12] In the latter case the foreign judgment is no bar whatever to the new proceedings.

Assuming that the Law of Canada is in this respect the same as that of England, it must then be ascertained—though the Privy Council did not do so—whether the *habeas corpus* proceedings were based on the existing custody order or on the original cause of action. The former alternative is however more likely. For the report mentions that when the mother instituted *habeas corpus* proceedings, seeking to have the infant delivered to her, she attached to her affidavit a copy of the American judgment which awarded the custody to her.

(2) An Order of a Court of Competent Jurisdiction

The first requirement is that the order must have been made by a Court of competent jurisdiction.[13] The validity of the order of the Californian Court had indeed been challenged on the ground that it had no jurisdiction to make it. But the Privy Council assumed, as it had throughout been assumed, that the order was validly made.[14] There was, therefore, no necessity to deal with this requirement.

(3) A Judgment

Next, the order in question must be what is commonly called a foreign judgment.[15] The Privy Council seems to have assumed that a custody order is not in the nature of a foreign judgment.[16]

[9] Spiro, op. cit., pp. 286, 290-92.

[10] Spiro, op. cit., pp. 169-70, 203.

[11] Spiro, op. cit., p. 291 ad notam 50 and p. 292 ad notam 55.

[12] Because a foreign judgment in favour of the plaintiff is said to lack the effect of making the original cause of action *res judicata*. This rule is peculiar to the English Conflict of Laws. As to details and statutory exceptions see : Halsbury, Laws of England, 2nd edition by Hailsham, vol. VI (Gwyer) pp. 325-6 ; Wolff, Private International Law, Oxford, 1945, p. 257 ; Schmitthoff, A Textbook of the English Conflict of Laws, London, 1945, p. 409; Cheshire, Private International Law, 3rd ed., Oxford, 1947, p. 767; Graveson, Conflict of Laws, London, 1948, p. 371 ; Dicey, op. cit., pp. 411-12. As to South Africa see also Pollak, The South African Law of Jurisdiction, Johannesburg, 1937, p. 247.

[13] *McKee's case* at pp. 362, 365. See also Wolff, op. cit., pp. 262-65 ; Schmitthoff, op. cit., pp. 415-421 ; Cheshire, op. cit., pp. 778 et sqq. ; Graveson, op. cit., p. 373.

[14] *McKee's case* at p. 362.

[15] Schmitthoff, op. cit., p. 413 ; Wolff, op. cit., pp. 258 et sqq. ; Dicey, op. cit., pp. 345 et sqq. See also Halsbury, op. cit., pp. 340-1 (status).

[16] *McKee's case* at p. 365 (but see also p. 363).

However, the concept of foreign judgment does not imply more than the exercise by a Court of the power of investigation and decision in a manner akin to judicial proceedings of the country called upon to enforce it[17] or, as the Restatement so aptly says, such judgment must have been rendered by an impartial tribunal after a reasonable notice and an opportunity to be heard has been given to all persons to be bound thereby.[18] If this is correct, as it is submitted to be, a custody order, made in such a manner, should not be held to be an exception. The jurisdiction of a Court sitting to guard the interests of a ward may to some extent be of a parental or administrative nature, the disposal of controverted questions being only an incident.[19] However, apart from the fact that judgments are given in other types of case where the administrative element is even more prominent,[20] it is not the nature of a particular jurisdiction, but the procedure which has been adopted which decides whether an act performed by a judge constitutes a judgment.

A custody order can be even more precisely characterized. It is customary to distinguish between a foreign judgment *in personam* which only operates between the litigants *inter se* and a foreign judgment *in rem* which operates against everybody. Judgments relating to status fall in the latter category. The incident of the custody of an infant appertains to status, and a foreign custody order may therefore be classified as a foreign judgment *in rem*.[21]

The exact extent of the concept of foreign judgment still needs classification,[22] e.g., the appointment of a guardian need not necessarily be in the form of a judgment, and the various legal systems may differ in this respect.[23]

In conclusion it is submitted that a custody order, made in the course of a matrimonial cause, constitutes a judgment in the sense attributed to it in the Conflict of Laws. The contrary view disposes of the necessity for any further inquiry into the question whether the Courts of Ontario were bound by the custody order of an American Court; however, the Privy Council, although denying the character of a foreign judgment to a custody order, did not close the inquiry at that point.

The peculiar nature of a custody order which in my submission does not affect its character as a foreign judgment, may yet have other consequences, as will be seen presently.

(*c*) A Final Judgment

To qualify for recognition and enforcement, a foreign judgment must further be " final," and it is final if it cannot be altered by the Court which delivered it.[24]

According to the Privy Council an order providing for the custody of an infant cannot in its nature be final.[25] The proper test of the finality of a foreign judgment has always been held to be the treatment of the judgment by the foreign tribunal as *res judicata*,[26] and the custody order in question was not final. The order of the Californian Court awarding the custody to the mother who had been deprived thereof by a former order of the same Court, is in itself proof that according to the Law of California, which had to be looked to, a custody order

[17] Dicey, op. cit., p. 346.

[18] Op. cit., sect. 429 (a).

[19] *Scott v. Scott* [1913] A.C. 417, at p. 437 per Haldane L. C.

[20] It may, e.g., be argued that any matrimonial cause falls, to a certain extent, within this category. See also *Hyman v. Hyman*, [1929] P. 30, per Scrutton L. J.

[21] *Rudoyevitch v. Rudoyevitch*, 1930 S.C. 619, at p. 624, per Lord President Clyde.

[22] Wolff, op. cit., pp. 258-60 ; Spiro, op. cit., p. 305.

[23] As to South African Law see Spiro, op. cit., pp. 287-88, 297-99 and p. 305.

[24] Schmitthoff, op. cit., p. 421 ; Wolff, op. cit., p. 267 ; Cheshire, op. cit., p. 798 ; Graveson, op. cit., p. 377 ; Spiro, op. cit., pp. 305-6.

[25] *McKee's case* at p. 365.

[26] Dicey, op. cit., p. 405.

is subject to alteration by the same Court which made it and is therefore not final in the Conflict of Laws sense.

From this it clearly follows that the Courts of Ontario could not recognize and enforce the custody order of the Californian Court because it lacked the requisite of finality. But as a particular legal system might differ in this respect from that prevailing in California, the judgment of the Privy Council would have been so much the poorer, had it not carried the investigation of the matter still further.

(*d*) The Overriding Principle: The Welfare and Happiness of the Infant

Even if a foreign judgment complies with all the requirements which have been set forth, its recognition and enforcement may yet be denied in certain exceptional circumstances, more particularly if a foreign judgment violates the public policy of the legal system which is faced with the problem of recognition and enforcement.[27] It may however at once be observed that it is somewhat difficult to arrive at the exact extent and nature of the concept of public policy.[28] Moreover, only in a few instances have the Courts been called upon to decide whether a foreign judgment was repugnant to the public policy of their legal system.[27]

It may be argued that an order awarding the custody of an infant to one of the parents ordinarily only allocates to them, as between themselves, rights and duties,[29] without affecting the exercise of such rights, the supervision of which is meant to be subject to the Court's jurisdiction only in so far as the infant is resident therein, and that if an order exceeds these limits it is capable of being repugnant to the public policy of the legal system of another country where the infant in fact resides.

The reasoning of the Privy Council is as follows: In common with the law of England[30] and of many other countries such as Scotland[31] and most, if not all, of the States of the United States of America, it is the law of Ontario that the welfare and happiness of the infant is the paramount consideration in questions of custody.[32] " To this paramount consideration all others yield. The order of a foreign Court of competent jurisdiction is no exception."[32] The Privy Council explains this proposition by reference to the nature and limits of the jurisdiction of a Court in relation to the custody of an infant.[33]

According to this view it is the paramount consideration of the welfare and happiness of the infant concerned which in custody matters encroaches upon the rules ordinarily governing the recognition and enforcement of foreign judgments, and it is indeed of no practical consequence whether it is this paramount con-

[27] Schmitthoff, op. cit., pp. 427, 431 ; Wolff, op. cit., p. 268 ; Cheshire, op. cit., p. 816 ; Spiro, op. cit., p. 306.

[28] See also Gutteridge, Comparative Law, Cambridge, 1946, pp. 97-100, and Cheshire, op. cit., pp. 185-196.

[29] See also Spiro, op. cit., p. 291.

[30] *McKee's case* at p. 365. The Privy Council did not rely so much on sect. 1 of the Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45) as Morton J., did in *In re B's Settlement*, [1940] Ch. 54. Far from introducing a new principle, this provision merely enacted the rule which had long been acted on in the Chancery Division of the High Court of Justice. The Privy Council also quoted *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, and *Stuart v. Bute* (*Marquis*), *Stuart v. Moore* (1861), 9 H. L. Cas. 440, and tried to harmonize with them certain dicta in *Nugent v. Vetzera* (1866), L.R. 2 Eq. 704, and *Di Savini v. Lousada* (1870), 22 L. T. 61. As to *In re B's Settlement* (supra) which has been criticized by some writers, the Privy Council contented itself (at p. 366) to point out that the said case has not been the subject of adverse judicial comment.

It is interesting to note that each and every one of these cases dealt with foreign guardians, but not with foreign custody orders ; see as to the appointment of guardians supra ad notam 23.

[31] *M'Lean v. Leftley* (*or M'Lean*), 1947, S.C. 79.

[32] *McKee's case* at p. 365.

[33] *McKee's case* at pp. 364, 365 and 366.

sideration or the principle of public policy[34] or the nature of the particular jurisdiction which restricts those rules.

(*e*) Persuasive Effect of a Foreign Custody Order

A foreign custody order is yet of great persuasive effect.[35] "Comity demands, not its enforcement, but its grave consideration."[36] What weight must be given to a foreign custody order will depend on the circumstances of each case.[37] But it is indispensable to form an independent judgment on the question of custody.[38] In other words, the existence of a foreign custody order is merely one of the circumstances which has to be weighed, together with all the other facts of the case, when the Court determines what is best in the interests of the infant in question.

The position, then, is very similar to that obtaining when a Court is asked to vary its own custody order, although not strictly the same because different legal systems may have a different approach. This leads to the problem of Conflict of Laws which will be dealt with sub II infra.

(*f*) An Additional Observation

A distinction must be drawn between the enforcement and the recognition of a foreign judgment.[39] A custody order in particular may be couched in such words that it cannot be susceptible of complete enforcement,[40] even in the country where it was made. In such a case the problem of enforcing a foreign judgment would not really present itself, but the question whether that order will be recognized still stands and may be put as follows: Will the legal position established by it be taken into account?

The solution is supplied by considerations similar to those set out before. The jurisdiction founded on the residence of the infant aims at protecting him or her. It must, therefore, likewise be the paramount consideration of the welfare and happiness of the infant in question which decides the issue, whereas the rights of the other persons concerned can again only have an incidental or evidential value in the sense set out above.

There is, therefore, no need for an analysis of the contents of the custody order in question.

III. CONFLICT OF LAWS

From the foregoing it follows that it had to be decided what was best in the interests of the infant concerned. The next step is to ascertain the legal system which had to supply the answer.

The Privy Council did not expressly deal with this problem. It only decided what inquiry had to be made, without saying how it had to be made.

There were contacts with various legal systems. The divorce was decreed in California. Father and son were resident, if not domiciled, first in California, then in Michigan, both States of the United States of America, and now in the Canadian Province of Ontario. For all we know, father and son may still be American citizens. Yet there can be no doubt, and it must be inferred by implication, that all the Canadian Judges, when directing their mind to the question what was the best in the interests of the infant in the present case, applied solely the Law of Canada. And, like the Canadian Judges, the Privy

[34] See also Spiro, op. cit., p. 270 ad notam 36 and note 36.
[35] *McKee's case* at pp. 363, 364 and 365.
[36] *McKee's case* at p. 365.
[37] *McKee's case* at p. 364.
[38] *McKee's case* at pp.363-64.
[39] Wolff, op. cit., p. 256 ; Spiro, op. cit., p. 304.
[40] Spiro, op. cit., p. 231.

Council applied the Law of Canada. Not only was the Privy Council sitting in a Canadian case,[41] it also acted on the principle that the question of custody of an infant is a matter which peculiarly lies within the discretion of the learned Judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.[42]

It is submitted that it could not have been otherwise. The inquiry into what is best in the interests of an infant deals with facts, but not with a question of law, and therefore calls for the application of the *lex fori*.[43] It likewise follows from the nature of the inquiry that it is the *lex fori* which governs. For if a Court is competent to look after the welfare of an infant within its jurisdiction, what other legal system but its own can decide whether steps, and if so what steps, ought to be taken in the interests of that infant? In this sense it may be said that the rules based on the public duty of the Sovereign to protect infants, are territorial in character.[44]

IV. VARIATION

Since custody orders are to safeguard the interests of the infant in question, an existing custody order must be presumed, it is submitted, to do so, particularly if it is not any longer appealable,[45] and will be varied[46] (or denied its persuasive weight[47]) only if new circumstances have been established which call for a different order. Here again it is the interests of the infant which decide the issue. The lapse of a very short time since the order was made in a particular case may militate against variation[48] whereas a longer period may make a substantial difference.

In the present case the conclusion was arrived at that not only was the lapse of two years relevant, taking into account the age of the infant, but also that the facts which, as appeared on the face of the Californian order, had influenced that Court had substantially changed. There was no longer the choice between California and a place not accessible, snowbound in winter, nor was the child any longer under the care and supervision of aged employees hired by the father for most of the time, and adequate transportation and school facilities were now available.[48] The fact that the father had broken an agreement solemnly entered into was not decisive because it did not affect the interests of the infant[49] (although it must undoubtedly have affected the interests of the wife). Nor could, for the same reasons, weight be given to the fact that the father took the child across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the American Court whose jurisdiction he himself had invoked.[50]

[41] See Wolff, op. cit., p. 91. In the words of Lord Haldane (*Hull v. M'Kenna and others*, [1926] I.R. 402), the Judicial Committee of the Privy Council is not an English body in any exclusive sense ; it is no more an English body than it is e.g. a Canadian body.

[42] *McKee's case* at p. 360 and infra sub V.

[43] See also Schmitthoff, op. cit., pp. 359 et sqq. ; Cheshire, op. cit., pp. 838 et. sqq. ; Dicey, op. cit., pp. 859 et sqq.

[44] See also Wolff, op. cit., p. 397.

[45] Spiro, op. cit., pp. 230-31.

[46] See supra ad notam 2 and note 2.

[47] See supra II (e).

[48] *McKee's case* at p. 364.

[49] *McKee's case* at p. 362.

[50] *McKee's case* at pp. 363-64.

V. POSITION OF AN APPELLATE TRIBUNAL

The Privy Council finally confirmed a principle which has long been followed.[51] The question of the custody of an infant is a matter which peculiarly lies within the discretion of the learned Judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and his decision should therefore not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.[52]

There was no reason for thinking that the learned Judge, who, after a full and exhaustive inquiry, awarded the custody of the infant to the father, had come to a wrong conclusion, and the Privy Council therefore restored his order.

VI. CONCLUSION

An attempt will now be made to summarize the new rules which may, directly or by implication, be inferred from the judgment of the Privy Council in *McKee's case*:—

(i) A custody question arising out of a matrimonial cause is no exception to the principle that the residence of an infant founds jurisdiction in regard to his of her protection.

(ii) A custody order of a foreign Court of competent jurisdiction, arising out of a matrimonial cause, is no exception to the principle that the welfare and happiness of an infant is the paramount consideration in questions of custody to which all others must yield. Such an order has, however, a persuasive effect in the sense that it is one of the facts which must be taken into account in determining what is best in the interests of the infant concerned.

(iii) The inquiry into what is best in the interests of the infant concerned. is itself, in the premises, governed by the *lex fori*.

NOTES ON CONSTITUTIONAL DEVELOPMENTS IN THE COMMONWEALTH

NOTES ON RECENT CANADIAN CONSTITUTIONAL DEVELOPMENTS

[*Contributed by* Professor W. R. Lederman.]

In the note on this subject for 1949-50, certain important constitutional developments in Canada were outlined, including the matter of devising a domestic procedure for amending the constitution and the problem of the validity of intergovernmental delegation of legislative powers. There is now more to report in both these respects.

As was explained in the earlier note, the Constitutional Conference of Federal and Provincial Governments held in Ottawa in January, 1950, agreed on five different domestic amending procedures which would be appropriate for various sections of the British North America Act, but they did not deal with the crucial question of which sections were to be amendable by which procedure. This task was left to a continuing committee representative of all provinces with the Minister of Justice for Canada as chairman. This committee met, received submissions from the federal cabinet and the provincial governments, and charted the areas of agreement and conflict respecting the classification of the various sections of the B.N.A. Act for the purpose of these amending procedures. A second session of the full conference was held at Quebec City in September, 1950. The deliberations were partly public and partly in camera, and at the conclusion of both types of meetings it was apparent that the project was not much advanced. Never-

[51] Spiro, op. cit., p. 204. See also the recent House of Lords' case *Bolton and others v. Stone*, [1951] 1 A. E. R. 1078.

[52] *McKee's case* at p. 360.

theless it was indicated that the continuing committee had been charged with further work armed with wider terms of reference and authority. Nothing in the way of progress has been reported to the public since that time (almost a year ago) so one presumes that the classification task is proving very difficult or that deadlock has actually set in.

The public proceedings of the September conference have been reported, along with the briefs on classification of the various governments. A study of these materials seems to reveal where the trouble lies. The real difficulty concerns the amendment of Section 92 which contains the enumeration of provincial powers. In particular there is the sweeping provincial category " Property and Civil Rights " contained in Section 92(13) which, as interpreted, has come to include not only such things as contracts, wills and land tenure, but also most of the field of modern social legislation and much of that of the regulation of industry, labour and trade. Only two of the agreed amending procedures are potentially relevant to the alteration of the provincial powers in Section 92. (a) If *not* deemed to concern fundamental rights of the people of the provinces as such, a category of provincial power is to be amendable by a statute of the federal parliament along with statutes of such majority of the provincial legislatures, and upon such additional conditions, if any, as might be agreed. *(b)* By contrast a category of provincial power deemed fundamental is to be subject to alteration only with the consent of all ten provincial legislatures along with that of the federal parliament. In real life such unanimity is virtually impossible to obtain, so the question of what is to be classed as fundamental is indeed crucial.

At this point the submissions of the various provinces on the classification of Section 92(13) becomes of great interest for obvious reasons. Six provinces and the federal government were in favour of breaking down the " Property and Civil Rights " power into several more particular classes, some to be specially entrenched by the unanimity rule and the remainder to be amendable in the more flexible way by majorities well short of unanimity. Two provinces were opposed to applying the unanimity rule to any part of Section 92(13), preferring the more flexible procedure for the whole of it. But the remaining two provinces, Ontario and Quebec, took the opposite position. They maintained that no part of the " Property and Civil Rights " power should be subject to change without the unanimous consent of the provinces. When it is remembered that Ontario and Quebec have more than half Canada's population and by far her greatest concentration of industrial plant, the importance of their stand becomes obvious. On the other hand, three or four of the premiers of other provinces asserted in the public sessions of the September conference that to specially entrench the whole of Section 92(13) would render the constitution so dangerously rigid in vital matters that the present situation respecting amendment would be the lesser evil. This would mean continued applications to Westminster by address from the federal parliament for any alteration of the B.N.A. Act, however unbecoming and even embarrassing this might be for all concerned. One suspects then that this is the nature of the deadlock on constitutional amendment procedures. Thus it seems that the present situation will continue and that the British Parliament will be involved in Canadian constitutional amendments for a long time to come. One wonders if its present convention of doing substantially as the Canadian Parliament asks would hold in the face of strong provincial dissents.

In contrast to the uncertainty regarding the future of constitutional amendment, the problem of the propriety of inter-governmental delegation of legislative powers has been judicially settled. At the beginning of this year the Supreme Court of Canada unanimously ruled that it was constitutionally invalid for the federal parliament or a provincial legislature either to delegate legislative power one to the other or to receive such a delegation. *(Attorney-General of Nova Scotia v. Attorney-General of Canada* 1951—Canada Law Reports—31.) There is nothing in the B.N.A. Act expressly forbidding this species of agency, but the

learned justices took the position that to permit it would be inconsistent with the whole scheme and purpose of the distribution of legislative powers which is the heart of a federal constitution. Thus this power, they said, is impliedly withheld from both Ottawa and the provinces. In the words of Chief Justice Rinfret (at p. 34):

> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject matters referred to it by section 91 and that each Province can legislate exclusively on the subject matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.

It will be seen that this decision treats delegation as if it were bilateral amendment of the constitution by the federal government and the province concerned. It was argued that this was not so since the delegated power was always revocable at the will of the delegator or principal. Mr. Justice Rand (at p. 50) gives the court's answer to this:

> The practical consequences of the proposed measure, a matter which the Courts may take into account, entail the danger, through continued exercise of delegated power, of prescriptive claims based on conditions and relations established in reliance on the delegation. Possession here as elsewhere would be nine points of law and disruptive controversy might easily result. The power of revocation might in fact become no more feasible, practically, than amendment of the Act of 1867 of its own volition by the British Parliament.

In spite of these considerations, some eminent Canadian constitutional authorities did believe that delegation did differ from amendment, and that to permit delegation at the will of the federal government and that of a province would bring a valuable element of flexibility to the constitution. It is interesting to note that this Supreme Court decision is subject to appeal to the Judicial Committee of the Privy Council, as the case originated in the courts before December 31st, 1949. Such an appeal is being considered but has not yet been decided upon. Finally, prior to this decision, certain provincial premiers had indicated during the sessions of the Constitutional Conference that if the judiciary ruled against delegation they would seek an amendment of the B.N.A. Act specifically authorizing it between the federal and provincial governments. Which brings us back to the beginning of this note—the problem of how to amend.

CONSTITUTIONAL DEVELOPMENTS IN AUSTRALIA

[*Contributed by* PROFESSOR Z. COWEN *and* PROFESSOR D. P. DERHAM.]

The Defence Preparations Act, 1951.—This Act of the Commonwealth Parliament confers very wide powers to make regulations and orders. It contains elaborate recitals relating to the tense international situation, to the need for Australia to make war preparations and to take sweeping action with regard to the regulation of the national economy and the control and use of resources. Section 4 confers power on the Governor-General to make regulations for or in relation to defence preparations. Section 4(2), without prejudice to the generality of this power, states that the regulations which may be made may relate to (a) the expansion of the capacity of the Australian economy for the purpose of enabling it to meet the demands of war, (b) diversion and control of resources, (c) the

adjustment of the economy to meet the threat of war or the avoidance of economic disorder caused by or impeding defence regulations, (d) the maintenance and sustenance of the people of Australia in the event of war and contribution to the maintenance of allied countries also engaged in war preparations. Regulations may not impose taxation, provide for the borrowing of money on the credit of the Commonwealth, prescribe compulsory direction of labour or provide for compulsory military service except as prescribed by other legislation.

The Act depends for constitutional validity on the power of the Commonwealth to legislate with respect to defence. In general, power to regulate the national economy is withheld from the Commonwealth and remains with the several States. However, in time of actual hostilities, the defence power has been interpreted so as to confer on the Commonwealth very wide powers to regulate and control the economic life of the entire nation. The High Court has also held that the defence power will support legislation regulating substantial areas of the national economy to enable the transition from war to peace to be effected without severe dislocation of the national life. However, as the period of actual hostilities recedes in time, this aspect of the defence power diminishes in extent, and recent decisions of the High Court indicate that it has little importance at the present time. The Defence Preparations Act rests, it appears, on that aspect of the defence power which is concerned with preparation for and protection against future and threatened war. On this aspect of the power, the decisions of the High Court are few in number. It is perfectly clear that the power will authorize the maintenance and recruitment of forces and provisions ancillary thereto. Beyond this, the decisions are uncertain in scope. The two principal cases on this aspect of the defence power are *The Commonwealth v. Australian Government Shipping Board*[1] and *Attorney-General (Vict.) v. The Commonwealth*.[2] In the first of these two cases, the High Court held that legislation authorizing a Commonwealth Shipping Board to engage in general engineering work and tender commercially for this purpose was not warranted by the defence power. In the latter case, the Court held that the Commonwealth Clothing Factory, whose principal function was the manufacture of clothing for the forces, might, under the defence power, be authorized to supply clothing to organizations which were not part of the armed forces. It may be noted that in the *Shipping Board* case it was argued unsuccessfully that only by authorizing the Board to engage in general activities could it profitably maintain the staff necessary to carry out naval works in naval dockyards. Very recently, in *Australian Communist Party v. The Commonwealth*[3] it was held that the Communist Party Dissolution Act could not be sustained under the defence power.[4]

Under the present Act, the Commonwealth claims the broadest powers to regulate the national economy. Presumably any constitutional challenge to the Act will be directed against regulations made under it. In determining whether the defence power will support the Act or such regulations, the gravity of the international situation will be highly relevant. Under present conditions, the threat of world war is ever present, and it is reasonable to argue that it is necessary to be in a state of constant preparedness against the event of an outbreak which may occur at any time. The scale of preparedness may well call for substantial controls over the national economy, as uncontrolled inflation would severely prejudice efficient preparations against the emergency of war. Also the scale of the undertaking may make such demands on the economic resources of the nation that national control of these resources may be a paramount necessity. In the matter of the Communist Party Dissolution Act, the High Court was not prepared

[1] [1926] 39 C.L.R. 1.
[2] [1935] 52 C.L.R. 533.
[3] [1951] Argus L.R. 129.
[4] See pp. 40-49 as above.

to assent to the proposition that in a period of " ostensible peace,"[5] the legislation was supportable under the defence power. However, it is perfectly possible for the High Court to distinguish that case from the case of the present Act.

Defence Preparations (Capital Issues) Regulations have been made under the Act.

Double Dissolution of the Commonwealth Parliament

For the second time in the history of the Commonwealth, section 57 of the Constitution was successfully invoked. This provides that if the House of Representatives passes any proposed law and the Senate rejects or fails to pass it or passes it with amendments unacceptable to the lower House, and if after three months the House of Representatives in the same or the next session again passes the law and the Senate again rejects it or fails to pass it, the Governor-General may dissolve the two Houses of Parliament simultaneously. The necessity for such a provision arises out of the fact that the two Houses may be irreconcilably opposed, so that a simultaneous dissolution and election to both may be the only possible method of resolving the deadlock. Section 57 goes on to provide that if, after the double dissolution and the subsequent election, the deadlock persists, the Governor-General may convene a joint sitting of both Houses, where the law may be carried by an absolute majority of the total membership of the two Houses.

On March 15, 1951, the Prime Minister, Mr. Menzies, formally requested the Governor-General to grant a double dissolution under the provisions of section 57. The request was granted on March 17.

The events leading up to this double dissolution may be briefly outlined. In the election of December, 1949, the Liberal-Country Party coalition obtained a decisive majority in the House of Representatives. In the Senate the Labour Party was in control. Fifteen Labour Senators, elected in 1946, still had three years of office. In 1948 a new Representation Act was passed which increased the membership in both Houses and provided for proportional representation for Senate elections. Under this system, seven senators were elected from each State in the 1949 elections.

It became abundantly clear that there was no hope of co-operation between the two Houses. Many of the legislative measures introduced by the Government were either rejected or held up by the Senate. The immediate cause of the double dissolution was the Bank Bill. The Government proposed to repeal the Bank Act of 1945. This Act had abolished the Commonwealth Bank Board, and in its place had set the Governor of the Commonwealth Bank, responsible to the Federal Treasurer. The new legislation proposed to restore the Bank Board. The bill passed the House of Representatives in March 1950, and in June the Senate deleted the clause restoring the Board. The lower House restored the clause and returned the bill to the Senate. At the same time, to comply with the procedural requirements of section 57, the House of Representatives passed a second bill in identical terms. The Senate returned the first bill to the lower House with the disputed clause deleted once more, and this bill had since remained in the House of Representatives. The second bill then went to the Senate, and on March 13, 1951, the Prime Minister challenged the Senate to reject it outright so that a double dissolution might be obtained. The following day the Senate voted to refer the bill to a Select Committee which was to report in four weeks. The government refused to nominate any representatives to this Committee which

Ferguson granted a double dissolution to the Liberal Prime Minister, Mr. Cook. Cook had a majority of one in the Lower House, while the Labour Party were in control of the Senate. A measure was deliberately manufactured to produce a situation of deadlock. The case has been subjected to critical examination by Evatt in *The King and His Dominion Governors* pp. 37 et seq. Evatt regards the 1914 cases as establishing four propositions: (1) So long as the conditions mentioned in section 57 are complied with, the Governor-General will grant a double dissolution to Ministers who possess the confidence of the House of Representatives. (2) It is not material to consider the importance or significance of the Bill, which, being the subject of dispute between the two Houses, becomes the occasion of the double dissolution. (3) In particular, it is not necessary that the Senate's rejection of the specified Bill should have created a condition of financial deadlock between the Houses. (4) It is immaterial that the Ministers deliberately set out to create the occasion mentioned in section 57, for that is exactly what the Cook government did. The decisive point in the 1914 case appears to have been that the Governor-General was not in a position to seek an alternative government. Although the Cook ministry had the smallest of majorities, it appeared that it was capable of governing in the lower House, while the Labour opposition was not in this position in the event of a refusal by the Governor-General, followed by the resignation of the government.

On this basis, as stated above, it appears that the Governor-General was amply justified in granting the double dissolution to Mr. Menzies. The position of the government in the House of Representatives was far stronger than that of Cook in the earlier case. The argument that the Senate had not rejected the measure, which it had referred to a Committee, is not persuasive. It is abundantly clear that this was simply a device to avoid taking up the challenge of the Prime Minister to reject it outright. The Labour Party had made it perfectly clear that it would not allow the bill to pass. Moreover, as already mentioned, much of the government's programme had been obstructed in the Senate. It is clear that there was a much stronger case for the Governor-General's action in 1951 than in 1914.

It remains only to record that the Menzies government was returned in the ensuing general election with a majority in both Houses. The Commonwealth Bank Act was subsequently passed through both Houses and received the assent on July 16, 1951.

NELUNGALOO PTY. LTD. v. *THE COMMONWEALTH*[1]

THIS was a claim for compensation or damages arising out of the acquisition of the plaintiff's wheat by the Commonwealth during the War. At first instance and before the Full High Court various issues, arising out of a complicated series of Acts and Regulations relating to both pre-war and wartime control of wheat marketing, were argued. The plaintiff failed at first instance and again on Appeal to the Full High Court where the members were equally divided. On further appeal to the Judicial Committee of the Privy Council the plaintiff failed on the jurisdictional question as to the competence of the appeal having regard to Section 74 of the Constitution.[2]

Before the Judicial Committee the issues appeared in this way:—

The National Security (Wheat Acquisition) Regulations provided by Reg. 14

[1] [1951] A.C. 34.

for the acquisition of all wheat harvested, and for the interests of producers in the wheat to be converted into claims for compensation. Reg. 19 provided for claims for compensation to be made in a prescribed form to the Wheat Board, and authorized compensation to be paid at such amounts as the Minister might determine on recommendation by the Board. The basis of compensation was directed to be by reference to surplus proceeds from disposal of the acquired wheat less appropriate handling expenses.

One of the grounds of appeal involved an attack on the validity of Reg. 19 as being beyond the power of the Commonwealth granted by Section 51 (xxxi) of the Constitution to acquire property on just terms—in that, so the appellants argued, Reg. 19 did not provide for just terms.

It was possible that the appellants could succeed in the appeal without reliance on that ground, but the ground was in fact relied on. The respondent argued that a decision on the validity of Reg. 19 involved the decision of an inter se question, and that therefore the jurisdiction of the Court to hear the appeal was denied by Sec. 74 of the Constitution unless a certificate was granted by the High Court of Australia. No application had been made to the High Court for a certificate.

Lord Normand delivered their Lordships' judgment. He reviewed the leading decisions relevant to Sec. 74 of the Constitution and the main arguments which had been advanced previously towards its interpretation. The view expressed by Dixon J. in a number of previous cases, and in particular developed by him in *Ex parte Nelson,*[3] that any dispute as to the limits of a concurrent power granted to the Commonwealth by Sec. 51 of the Constitution raised an inter se question, was accepted, though that view might well have been thought to be settled law before this.

Dixon J.'s view of the power granted by Sec. 51 (xxxi) that it is a power to make laws with respect to a compound conception, namely, " acquisition-on-just-terms " was also accepted by their Lordships. And it was held that the attack on Reg. 19 on the ground that it was outside the power granted by Sec. 51 (xxxi), raised an inter se question.

It remained to decide whether that decision rendered the whole appeal incompetent or whether the Court had jurisdiction to hear the other issues raised on appeal. It has already been noted that the Appellants might have succeeded without challenging the validity of Reg. 19 at all. It should also be noted that the matter of the validity of Reg. 19 had not been put in issue in the High Court and no decision on that regulation had been given by the High Court from which appeal could be brought. For the appellants it was argued that the appeal must be entertained unless it was apparent in limine that an inter se question must necessarily be decided in the course of the hearing.

In the *Bank Nationalization Case*[4] the Judicial Committee had held that a certificate from the High Court was necessary in every case where an appeal could not be decided without the determination of an inter se question. In that case the appellants did not appeal from a decision on an inter se question nor did they raise any inter se question in their appeal as framed; but the respondents before the High Court had (as plaintiffs) challenged the legislation in a number of ways raising inter se questions, and had failed therein. The appellants to succeed before the Judicial Committee had to hold the decision on those questions given in their favour by the High Court.

Sec. 74 of the Constitution was construed as requiring a certificate from the High Court for every appeal " involving " any inter se question, and in the circumstances described the appeal was held to " involve " the decision of inter se questions.

[3] [1929] 42 C.L.R. 258.

[4] [1950] A.C. at p.293.

That construction and the spirit of that decision were adopted and applied in the present case, and it was held that the High Court's Certificate was necessary where the appellant raised an inter se question on appeal, even although the High Court had given no decision on that question from which an appeal could be brought, and even although the appellant might succeed in the appeal without requiring decision of the inter se question.

This case confirms the tendency, evident particularly in recent cases before the Judicial Committee, to give effect to what has been called " high policy " of the Constitution, that is: to make the High Court the final judicial authority when questions of Federal Constitutional power in Australia are concerned. It is perhaps not unfair to go further, and to describe the tendency as a wider one, to make the High Court the final authority wherever possible when Australian Constitutional difficulties must be solved.

One further comment must be made. Their Lordships, in reviewing the leading decisions, and in stating the received doctrine relating to inter se questions, said, after stating that no inter se question could arise under Section 92 of the Constitution,[5] " Equally, when a power is declared to be exclusively vested in the Commonwealth, no question can arise as to the limits inter se of the powers of the Commonwealth and those of any State, and on this point the reasoning of Dixon J. in *Ex parte Nelson (No. 2)*[6] appears to their Lordships to be conclusive." That remark was of course obiter, but, it is submitted, it goes too far and may lead to confused thinking. Firstly, the reasoning of Dixon J. referred to by their Lordships does not, it is submitted, support the assertion made; rather it goes in the other direction. Secondly, there seems to be a tendency, demonstrated by the words quoted, to think that only a decision on the limits of a concurrent power of the Commonwealth can raise an inter se question. In the early days of the Constitution, the view was put strongly that an inter se question was raised only when the limits of exclusive powers were in issue, because only then were the mutual boundaries of State and Commonwealth powers fixed so as to confirm power to one Government and deny it to another. As is seen in the present case, that view has been rejected as providing an exhaustive test; but, it is submitted, the rejection of that view as an exhaustive test does not require its rejection absolutely. The acceptance of the rule that a decision on the limits of a Commonwealth concurrent power raises an inter se question does not require the treatment of the two views referred to as being mere alternatives and mutually exclusive, so as to require the absolute rejection of one as a consequence of the acceptance of the other.

THE WOOL TAX CASE—MOORE v. *THE COMMONWEALTH*[1]

By a scheme of three separate but interconnected Acts the Commonwealth sought to draw off from the money pool of Australia some of the vast sums being received for Australia's wool. The scheme, in brief, imposes a liability on producers of shorn wool, at the point of sale or of export thereof, to pay to the Commonwealth a proportion of the price received on sale or of the appraised value at the time of export, as the case may be. In the case of sale the selling broker is required to deduct the prescribed proportion from the price and pay it direct to the Commissioner of Taxation. In the case of export the producer is required to pay to the Commissioner the prescribed proportion before export. In both cases the producer receives a certificate of payment in respect of the amount paid which, on being sent in with the producer's tax return for the year of income in which the wool was sold or exported, is to be accepted as a tax

[5] Sec. 92 prohibits interference with the freedom of interstate trade commerce and intercourse.

[6] [1929] 42 C.L.R. 258, at p.272.

[1] [1951] A.L.R. 258.

credit for the amount shown. There were complex provisions governing variations from year to year in the proportions, of price or value of wool sold or exported, to be deducted.

The High Court (Latham, C.J., Dixon, McTiernan, Webb, Fullagar and Kitto, JJ.) held that the Acts constituting the scheme were within the legislative power of the Commonwealth as being " with respect to taxation," and were not any of them invalid as being Acts imposing taxation and dealing with more than one subject of taxation contrary to Section 55 of the Constitution.

The majority of the Court held that none of the Acts was a tax imposing Act; but they were all Acts ancilliary to an existing (i.e., income) tax and were therefore legislation " with respect to " taxation within the meaning of Section 51 (ii) of the Constitution.

The whole Court rejected the argument that the Acts were not in pith and substance to do with taxation at all, but were anti-inflation Acts, the real object of which was to freeze monetary funds. It was accepted that that object was no more than an external and political motive or purpose and not the measure of the legal character of the Acts.

The case is another fixed point in the interesting but difficult border area previously marked out by *R. v. Barger*[2] on the one hand, and *Osborne v. the Commonwealth*[3] on the other. In *Barger's case* legislation which purported to be with respect to taxation was held not to be in truth tax legislation but legislation on the subject of industrial conditions. The Acts in question imposed taxes on manufacturers of certain articles and provided for exemption from the tax for manufacturers who satisfied given standards of industrial conditions in their factories and in relation to the employees. In *Osborne's case* Land Tax Acts which imposed progressive tax charges on land in such a way as was calculated to break up large estates were held to be in truth tax legislation and the ultimate purpose, and perhaps foreseeable result, of the tax was held to be mere political motive and irrelevant to the true character of the legislation.

NOTES ON SOUTH AFRICAN CONSTITUTIONAL LAW

[*Contributed by* Professor Ellison Kahn.]

THE LEGISLATURE.

The "Entrenched Sections" of the South Africa Act and the Coloured Vote. —The most important constitutional change in the past year has been the passing of the Separate Representation of Voters Act, No. 46 of 1951, which has removed the Cape Coloured voter from the previous common roll and placed him on a separate roll. The introduction of the Bill—originally entitled " Representation of Non-Europeans Bill "—raised the issue of the so-called " entrenched sections " of the South Africa Act. The sections relating to the coloured franchise are sections 152 and 35. Section 152 reads:

> " Parliament may by law repeal or alter any of the provisions of this Act: . . . Provided . . . that no repeal or alteration of the provisions contained in this section, or . . . in sections 35 and 137, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed shall be taken to have been duly passed by both Houses of Parliament."

Section 35 lays down that no law may disqualify anyone (save a native) in the Cape from being registered as a voter by reason of race or colour alone, unless the procedure set out in section 152 is followed.

These entrenched clauses were undoubtedly binding before the passing of the Statute of Westminster, 1931 (*R. v. Ndobe,* 1930 A.D. 448). When the proposed Statute of Westminster was being discussed in Parliament, however,

2. [1908] 6 C.L.R. 161.
3. [1911] 12 C.L.R. 321.

General Smuts expressed the view that the entrenched clauses would disappear (*House of Assembly Debates*, 22nd April, 1931, cols. 2739-41). The same view was taken by Mr. Walter Pollak who, in a learned article (48 [1931] *S.A.L.J.* 269), contended that section 152 rested entirely on the Colonial Laws Validity Act, 1865, and once this Act ceased to be operative, as it would under the proposed Statute, the South African Parliament would no longer be bound to observe the terms of section 152, but could alter or repeal any section of the South Africa Act in the ordinary way. The Colonial Laws Validity Act, section 2, stated that any colonial law repugnant to an Imperial law extending to that colony, would be void to the extent of such repugnancy. The proposed change (which later became section 2 of the Statute of Westminster) was to the effect that the Colonial Laws Validity Act would not apply to any law made thereafter by a Dominion Parliament; that no law made thereafter by a Dominion Parliament would be void on the ground of repugnancy to an Act of the United Kingdom Parliament; and that a Dominion Parliament would have power to repeal or amend such an Act so far as it was part of the law of that Dominion.

The matter was debated in the South African Parliament at the time, and it was acknowledged by Government members that whatever the legal position might be, it was a matter of good faith and honour to respect the entrenched sections; and both Houses passed a resolution approving the draft Statute of Westminster " on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act ". No legal safeguards were asked for, nor given, as they were in the Statute in the cases of Canada, Australia and New Zealand.

The Speaker, Dr. E. G. Jansen, in the debate on the Status of the Union Bill on 25th April, 1934, gave a ruling that the procedure of the entrenched clauses would have to be followed (*House of Assembly Debates*, col. 2736); similar rulings were given on the 17th April, 1940, by the Chairman in the Committee of the whole House in the discussion on the Electoral Laws Amendment Bill, and by Mr. Speaker van Coller on the 2nd April, 1945, in connection with the proceedings of the Select Committee on Electoral Laws Amendment (see S.C. No. 13 of 1945).

The matter actually came before the Courts in 1937 in *Ndlwana v. Hofmeyr, N.O.*, 1937 A.D. 229. Parliament had followed the procedure of the entrenched clauses in passing the Representation of Natives Act, 1936, removing the Cape native voter from the common roll. It was argued, rather curiously, by Ndlwana, who had been so deprived of his vote, that the Act should not have been passed in the manner it was, but that Parliament should have functioned in the ordinary bicameral way. He lost his case. The full Bench of the Cape Provincial Division was of opinion that the removal of the native voters on to a separate communal roll did fall within the ambit of section 35; and there are *dicta* in the judgment of van Zyl, J.P., who delivered the opinion of the Court, that the passing of the Statute of Westminster did not affect the entrenched sections, which remained of full force. The Appellate Division, however, went—or appeared to go—much further. In a now famous passage Stratford, A.C.J., said:

> " Parliament's will, as expressed in an Act of Parliament, cannot now in this country, as it cannot in England, be questioned by a Court of Law, whose function it is to enforce that will, not to question it . . . Parliament . . . can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act is so far as Courts of Law are concerned at the mercy of Parliament like anything else. . . . It is not necessary to refer to the case of *R. v. Ndobe* . . . since that case was decided before the Statute of Westminster."

Whether this statement was *obiter* or not has ever since been the subject of argument. But at all events, *obiter* or not, it strengthened the case of those who followed the approach of Mr. Pollak; which, it was thought, was also

strengthened by the Privy Council case of *Moore v. Attorney-General of the Irish Free State,* [1935] A.C. 484. There can be no doubt that the prevailing view, before the matter became a live issue in 1948 with the new Government raising the possibility of legislation putting Coloured voters on a separate roll, was that there was no need to follow the procedure laid down in section 152. (See, e.g., Kennedy and Schlosberg, *The Law and Custom of the South African Constitution* (1935), 100-1; Jennings and Young, *The Constitutional Laws of the British Empire* (1937), 265; G.G.P. (Phillips), 48 (1932), *L.Q.R.* 456; Wheare, *The Statute of Westminster and Dominion Status,* 4th ed. (1949), 240-1 and 330 esp. n. 2 and 3; May, *The South African Constitution* (1949), 26; Welsh, *The Commercial Law Reporter,* Nov. 1948, pp. 659ff. esp. pp. 666-7; *The Annual Survey of South African Law,* 1948, p. 9; Keith, *The Dominions as Sovereign States* (1938), 177 no. 1.)

In 1948 the Cabinet asked the advice of the seven Government Law Advisers. They were unanimously of opinion that there was no need to follow the special procedure of the entrenched sections in either removing Coloured voters from the common roll or putting an end to the separate representation of natives in the lower House. (It might be remarked that the Government has not proceeded to take the latter step.) " This conclusion," they wrote, " is in accord with the concept of the sovereignty of the supreme legislative authority within the state."

At this stage appeared a rift in the lute. Professor Cowen, of the University of Cape Town, attacked the conclusion of the Law Advisers, contending that the entrenched sections were binding, as setting out the manner and form of legislating. His original views can be found in an article in *The Commercial Law Reporter,* June, 1949, p. 359. A fuller analysis, in which he modifies some of his earlier views, is contained in his monograph, *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act,* published this year.

It is hardly possible to summarise in a paragraph or two the contents of this brilliant essay. The following can give but the bare bones of his arguments. Professor Cowen denies that the efficacy of the entrenched sections rested on the Colonial Laws Validity Act. His thesis is that their efficacy rested and *still rests* on the simple ground that they set out the conditions necessary for the expression of Parliament's will. He cites in support a number of authorities, whose views are best put by Latham (*The Law and the Commonwealth,* p. 523): " where the sovereign is any one but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him." Cowen fully and unreservedly recognizes that the Union is a sovereign state and the Union Parliament possesses sovereign legislative power, but asserts that the continued efficacy of the entrenched sections is not incompatible with this. " The doctrine of Parliamentary Sovereignty merely emphasizes the unlimited scope of what Parliament may do by legislation: it does not bear upon what must be done by the constituent elements of Parliament in order to legislate." Here he finds support in the well-known article by Sir Owen Dixon in 51 (1935) *L.Q.R.* 603, where the learned Judge speaks of the " distinction between powers of legislation and the mode and procedure of their exercise "; and in the Australian High Court decision of *Attorney-General for New South Wales v. Trethowan* (1931), 44 C.L.R. 394. (The Privy Council decision on appeal ([1932]) A.C. 526) does not aid him.)

As regards section 2 of the Statute of Westminster, Professor Cowen contends that, looking to the history of the Statute, in particular to the resolutions of the Senate and House of Assembly in 1931, the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 (Cmd. 2768), the Report of the Imperial Conference of 1930 concerning Inter-Imperial Relations (Cmd. 3717), and the Report of the Conference on the Operation of Dominion Legislation, 1929 (Cmd. 3479), one must conclude " that it was not the intention of

the Statute . . . to enable the constituent elements of the Union Parliament to repeal the entrenched sections without first observing their provisions." The real objects of the " saving sections " in the Statute relating to the constitutions of Canada, Australia and New Zealand were to guard against a liberal construction of the Statute which would give these Dominion Parliaments complete powers of constitutional charge without intervention by the Imperial Parliament, powers which were not desired by them; and to preserve the federal structures of Canada and Australia. Such considerations did not apply to South Africa.

The decision in *Moore's* case, says Cowen, in no wise conflicts with his thesis. The problem there in issue, viz., the area of power of the Irish Parliament, was quite a different problem from that of the manner and form of legislating, raised by the entrenched sections.

Though very doubtful whether the celebrated *dictum* of Stratford, A.C.J., in *Ndlwana's* case was not *obiter*, Cowen is prepared to concede that it is part of the *ratio decidendi;* he argues that the Appellate Division today should refuse to follow that decision, on the ground that it is " palpably wrong ".

Finally, Cowen submits that his case might be proved along quite different lines, namely, that the South Africa Act creates fundamental law, being the expression of a compact between the four self-governing Colonies to unite. " Accordingly, it would not be a contention without force that the South Africa Act is a British Act in form only, but in substance a constitution created by the will of the South African people."

The foregoing sets out the position on the eve of the debate in the House of Assembly, commencing on the 8th March, on leave to introduce the Representation of Non-Europeans Bill. The contentions of the Opposition followed closely those of Professor Cowen, whilst Government spokesman pressed the " orthodox " view on the Speaker.

On 10th April, Mr. Speaker Conradie gave his considered ruling on the point of order raised by the Opposition. (*House of Assembly Debates,* cols. 4201 ff.) He did not find it necessary to decide whether the Bill fell within the purview of section 35, for he found that in any event Parliament was no longer bound by the procedure laid down by that section. In coming to this conclusion, the Speaker laid great stress on the number of writers who had supported it in the past, on *Moore's* case, and in particular on *Ndlwana's* case. The resolution of the House in 1931, he held, was not referred to in the annual report of the Clerk of the House, and was thus no precedent of procedure for him to follow. Mr. Speaker Jansen's ruling in 1934 was so recorded, but in 1937 the Clerk pointed out in his Report that the effect of *Ndlwana's* case was that Parliament was not bound by its own constitution; that report was published with the Speaker's authority, who must thus be assumed to be prepared in future to accept the guidance of the Appellate Division.

Mr. Speaker made no reference to the opinion of the Parliamentary Draftsman, Mr. A. J. Pienaar, K.C. The Rules dealing with the appointment, office and duties of the Parliamentary Draftsman provide that it is one of his functions to ensure that the provisions of Bills " contain proper legal bearing on existing legislation, which such Bills purport to amend, alter or repeal." In his opinion, which was tabled in the Senate on 18th May, Mr. Pienaar concluded that

> " . . . Parliament . . . in order to function as Parliament and make effective laws . . . must be constituted and function according to the law from which it derives its authority—the South Africa Act, and for the purposes of this Bill, sections 35 and 152 are still of force and effect."

The President of the Senate was no more influenced by the views of Professor Cowen and Mr. Pienaar than was the Speaker, and came to the same conclusion as the latter. (See *Senate Debates,* 24th May, cols. 4259 ff.)

The Bill thus proceeded through both Houses in the ordinary way, was assented to by the Governor-General on 15th June, and the Act was promulgated in the *Government Gazette* on the 18th June. This is as far as the matter

has gone at present, but proceedings are now being taken to test the Act in the Courts. It is of interest to note that no effort was made to obtain an injunction (interdict in the terminology of South African law) to restrain the Ministers and officers of Parliament from presenting the Bill to the Governor-General for signature. The precedent set by *Trethowan's* case was not followed. It is doubtful whether the procedure adopted in that case was correct (see Sawer, 60 (1944) *L.Q.R.* 83 ff.); in any event the language of the Statute there in question stated that " a Bill . . . shall not be presented to the Governor . . . ", which is not the language of sections 35 and 152; further, there are *dicta* in the South African case of *Masai v. Jansen, N.O.*, 1936 C.P.D. 361, which indicate that an application for an injunction would fail (see 60 (1944) *L.Q.R.* 226-7); finally, it is not without interest that in a recent Indian case the Divisional Court of Allahabad held that the courts cannot restrain the Legislature from making an invalid law, their function being to decide later in a concrete case before them whether the Act is invalid or not (*Chotey Lal v. The State of Uttar Pradesh*, A.I.R. 1951 All. 228).

The Change in the Coloured Vote.—The actual terms of the Separate Representation of Voters Act, No. 46 of 1951, deserve a brief discussion.

The Act provides for the compilation of two separate voters' lists—the Cape Coloured voters' list, to contain the names of Cape non-Europeans on the existing common roll, and the names of future Cape non-Europeans who fulfil the existing franchise qualifications; and a European voters' list for the Cape Province.

As is at present the case in the Transvaal and Orange Free State, the European voters' list will in future be the list in the Cape for the election of members of the lower House under the South Africa law, and for the election of provincial councillors.

The Cape non-European voter, as compensation for the removal of his name from the hitherto common roll, is to have the right to elect four members of the House of Assembly and two provincial councillors. These are to be in addition to existing members. If the number of members of the House of Assembly (not including representatives of South-West Africa or of the natives) is increased or decreased by statute in future, then the number of representatives of the Cape non-Europeans is to vary in such manner that it bears as nearly as possible the same ratio to the number of such members of the lower House as 4 bears to 150. This section of the Act is, of course, an expression of faith only; it does not make fundamental law.

The Cape non-European representatives must themselves be Europeans. They do not have the right to participate in the election of Senators. (This election is by an electoral college consisting of the members of the House of Assembly representing the Province and the provincial councillors of such province.)

The Act, departing from the precedent established by the Representation of Natives Act, 1936, makes no provision for elected Senators representing the Cape non-Europeans. There is, however, to be one further Senator, to be nominated " on the ground of his thorough acquaintance, by reason of his official experience or otherwise, with the reasonable wants and wishes of the non-European population of the province of the Cape of Good Hope." The Courts, it goes without saying, will not be able to exercise any control over the choice by the Government of such a Senator.

The two additional members of the Cape Provincial Council, representing Cape non-Europeans, may themselves be non-Europeans, provided they have the right to vote. (Only male non-Europeans have the franchise, and there is a law educational and property test.) These two provincial councillors will not have the right to vote at elections for Senators.

The Act also affects the position of the non-European voter in Natal. Existing voters (there are about 2,000 of them) will retain their rights on the

common roll but no new names can be added. Thus in the course of time there will be no non-European voter left in Natal.

The first election of the representatives of the Cape non-Europeans in the House of Assembly and the Cape Provincial Council will not take place until the House of Assembly is dissolved or a general election of the Provincial Council is to take place, and until, in addition, there has been a new Union delimitation. As the law stands at present, there will be a new delimitation in the near future, as a Union census took place in May this year, and the Governor-General is required to appoint a delimitation commission " as soon as may be " after every census (section 41, South Africa Act).

It is of interest to note that the Separate Representation of Voters Act requires the election of the representatives of the Cape non-Europeans in the lower House and the Provincial Council to take place not less than eight days before the polling day for a general election.

Equality of the Official Languages.—A constitutional question of highest order, which has seldom come before the courts in the past, arose in *Swart, N.O.,* and *Nicol, N.O. v. de Kock* and *Gartner,* 1951 (3) S.A. 589 (A.D.): the true construction of section 137 of the South Africa Act, which provides for equality of the official languages, and is entrenched under section 152. It runs:

> " Both the English and Dutch languages shall be the official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights and privileges . . . "

Act No. 8 of 1925 declares that the word " Dutch " in this section includes Afrikaans.

Applicants in the case contended that the Education Act (Language) Amendment Ordinance, No. 19 of 1949 (Transvaal), was invalid. The Ordinance provides that the medium of instruction in all schools, public (i.e. State) or private, shall be the pupil's home language, which is defined as the language in which the pupil is most proficient. It was claimed, *inter alia,* that this provision interfered with the language rights of a citizen under section 137, in the cases both of private and public schools, and was thus *ultra vires,* inasmuch as a Provincial Council cannot pass an enactment in conflict with the South Africa Act.

The Appellate Division, by a majority of three to two, rejected applicants' submission. The basis of the majority decision is that a law which does not discriminate against either language, complies with the section; it is not necessary that every individual be given a free choice to use whichever language he pleases. The strongest expression of this view is found in a passage in the judgment of van den Heever, J.A.: " If an ordinance distributes restrictions on or enlargements of personal liberty without distributing the balance [between the two official languages], it cannot be said to be in conflict with section 137."

Schreiner and Hoexter, JJ.A., the minority judges, took a diametrically opposite view. " Section 137," said Schreiner, J.A. (at p. 612), " guarantees not merely freedom of the two official languages but also the free use by all persons of whichever languages they choose to use. Equal freedom is not the same as absence of equal freedom and it is the former which is guaranteed." In his concurring judgment Hoexter, J.A., said: " That right of choice . . . is the right which (I say so with great respect) seems to me to be denied to the individual by the judgments of the Chief Justice and by my Brothers van den Heever and Fagan."

THE CROWN AND THE EXECUTIVE

Delict.—The decision of the Transvaal Court in *Sibiya v. Swart, N.O.,* 1950 (2) S.A. 752 (T), which was reviewed in this Journal last year (von. XXXII, p. 81), was overruled by the Appellate Division (*Sibiya v. Swart, N.O.,* 1950 (4) S.A. 515 (A.D.)). The facts were that a native constable, having lawfully

arrested S, in the process of taking him to a charge office in pursuance of a statutory duty under the Criminal Procedure and Evidence Act, 1917, unlawfully assaulted him. S sued the Crown under the Crown Liabilities Act, 1910. The Transvaal Court held that the Crown was not liable as its servant was acting in the course of a statutory duty. The Appellate Division, in upholding the appeal, pointed out that the test of exemption of the Crown from liability was not the statutory nature of the servant's duty, but its personal nature, in the exercise of which the servant was not under the control of and subject to the commands of his employer, i.e., the Crown, acting through its agents, the employee's superior officers. Since in the instant case in terms of the Police Act, 1912, the constable was bound to perform duties imposed on him by any law, and obey the lawful orders of his superiors, and the duty to take S to the charge office was one of a non-discretionary nature, the Crown was liable.

THE CITIZEN AND THE STATE

The Suppression of Communism Amendment Act, 1950.—In the last review of constitutional developments of the Union, the Suppression of Communism Act, No. 44 of 1950, was discussed (see Vol. XXXII, pp. 86 ff.). The Act was amended in several respects this year (Act No. 50 of 1951), to clear up a number of difficulties that the Government had encountered in administering it. Some of the difficulties had emerged in the case of *Kahn v. Louw, N.O.*, 1950 (2) S.A. 194 (C). The relevant facts were as follows: The Act stated that, amongst other bodies, the Communist Party " is hereby declared to be an unlawful organization " (section 2 (1)). The Communist Party was defined as " the organization known by that name on the fifth day of May, 1950, notwithstanding any change in the name of that organization after the said date " (section 1 (1)(xv)). The Act went on to say that a liquidator, appointed by the Minister, was under a duty, on the direction of the Minister, to compile " a list of persons *who are or have been* office-bearers, offices, members of active supporters of . . . an unlawful organization " (section 4 (10). My italics). The effect of being named on the list was (and is) serious, for the Minister can require a named person to resign from or not become a member of, a specified organization; not become a member of the civil or local government service, or if such a member, to resign; not to become a member of Parliament or a Provincial or Municipal Council; and there was (and is) provision for securing that if such person is a member of one of these last mentioned bodies, that he shall cease to be such.

The Act was signed by the Governor-General on 26th June, 1950, and promulgated in the *Government Gazette* on 17th July, 1950. The Central Committee of the Communist Party, however, had issued a statement that the Party had been dissolved on 20th June, 1950. K, being called on by the liquidator appointed by the Minister to show cause why he should not be named, contended that the Communist Party, not being in existence at the time the Act was promulgated, had not become an unlawful organization, and that therefore the liquidator's appointment was null and void. The Full Bench of the Cape Provincial Division found, however, that K had failed to prove that the Communist Party had been dissolved in accordance with its own constitution.

It was also contended that K had severed all connections with the organization before the 17th July and that he could not be named, as the words " who are or have been office-bearers, etc. " in section 4 (10), referred to any time after the 17th July. The Court refrained from deciding this point, though it expressed the view *obiter* that this was not the true construction: the words "have been," it felt, meant " have been at any time."

K thus failed in his application for a declaration of rights; but an appeal was noted. The Government then indicated that it would introduce a Bill to safeguard against the possibility that the decision of the Court was incorrect, and the appeal was withdrawn.

The amending Act alters the definition of the Communist Party, so that it is immaterial that the Party has been dissolved. It inserts the phrase " at any time before or after the commencement of this Act " in section 4 (10) after the words " who are or have been " printed in italics above, and makes consequential amendments to other sections.

Thus the points raised in *Kahn's* case have been covered. But the amending Act goes much further. The definition of communist in the original Act was couched in terms referring to present belief or conduct; the amendment refers also to past beliefs and conduct. The first definition covered a person who professes to be a communist, or is deemed to be a communist on the ground that he is advocating or defending, or has at any time after the commencement of the Act, advocated or defended, the achievement of any of the objects of communism, or any act or omission calculated to further such achievement. The new definition covers in addition any person who at any time *before* the commencement of the Act professed to be a communist or advocated or defended the achievement of any of the objects of communism or any act or omission calculated to further such achievement. The amending Act also defines as a communist a person deemed to be such on the ground that he is or any time was a member of an extra-Union organization professing to propagate communism, one of the purposes of which was to propagate communism, or which has engaged in activities likely to further the achievement of any of the objects of communism.

The amending Act also simplifies the procedure whereby a Senator, member of the House of Assembly or member of a Provincial Council who is named or deemed to be a communist or member of an unlawful organization, or who commits an offence under the Act, loses his seat.

The power of the Governor-General to prohibit the publication of periodicals has been extended to those which serve *" inter alia "* (and no longer " mainly ") as a means for expressing views propagated by an unlawful organization, or which did so serve immediately before the organization became an unlawful one; and to periodicals which serve *" inter alia "* (and no longer " mainly ") as a means for expressing views or conveying information calculated to further the achievement of any of the objects of communism.

A new section 17 *bis* is added to the principal Act. It exempts from civil and criminal proceedings anyone who describes as a communist a person who is named on a liquidator's list of present or past officers, members and active supporters of an unlawful organization; who at any time after the commencement of the Act professed to be a communist; who has been deemed by the Governor-General to be a communist; who was a member of the Senate, House of Assembly or a Provincial Council and who has lost his seat in terms of the procedure mentioned earlier; or who has been convicted of one of certain specified offences under the Act.

The amending Act is deemed to have come into operation on 17th July, 1950, i.e., the date on which the original Act was promulgated.

NATIVE ADMINISTRATION

Certain important changes were effected by the Bantu Authorities Act, No. 68 of 1951.

The Act abolishes the Native Representative Council, which had been established by the Representation of Natives Act, No. 12 of 1936 (the statute which deprived the Cape native of his vote on the common roll). The Council consisted of a majority of elected native representatives. Its functions were merely those of making recommendations to Parliament and the Government, and reporting on proposed legislation, on matters referred to it by the Minister and on the provision to be made in the annual estimates of moneys to be applied for native purposes. Thus the Council was a mere debating chamber, and in the course of years its members became more and more dissatisfied with their

lack of legislative and executive functions. Matters came to a head in August, 1946, when the Council adjourned *sine die* as a protest against what it referred to as the Government's breach of faith and failure to meet the urgent needs of the native peoples. General Smuts tried to break the deadlock in 1947, when he put forward certain tentative recommendations for linking the Council with native local authorities and advisory boards in the reserves and urban areas; but these suggestions did not prove acceptable. The Council did not meet again.

There is thus at present no body representative of all the Union natives. The Native Affairs Act of 1920, however, provides for the summoning by the Governor-General of a conference of native chiefs and other delegates " with a view to the ascertainment of the sentiments of the native population of the Union " (section 16). The Bantu Authorities Act has a similar section (section 15).

The Bantu Authorities Act also establishes machinery which can lead to important changes in local government in native areas. The position at the time of the Act was that in certain native areas (mainly in the Cape) there were a number of local councils, and two general councils—the United Transkeian Territories General Council (popularly known as the Bunga) and the Ciskeian General Council. These local and general bodies had no real legislative power, being merely advisory to the Native Affairs Commission, itself merely advisory to the Minister. But these bodies, each of which consisted of a majority of elected native members, had certain powers of spending funds with which they were vested. The picture of local government was completed by the appointment by the Governor-General of tribal chiefs and headmen, with prescribed rights, powers and privileges.

The new Act does not effect an immediate change in this structure of local government. What it does is to provide the means for the establishment by the Governor-General of three new local administrative bodies—tribal, territorial and regional authorities.

A tribal authority is to consist of the chief or headman of the tribe or community in question, and as many councillors as the Governor-General decides to appoint. Its functions will be general administration, the rendering of assistance and guidance to the chief, advice to the Government and any territorial or regional authority having jurisdiction over its area. It, and the chief, must exercise the power assigned with due regard to local native laws and customs. Certain funds are allocated to the treasury of a tribal authority.

A regional authority may be established by the Governor-General in respect of two or more areas of tribal authorities. Its functions will be to advise, and make representations to the Minister on matters of general interest, and to exercise certain executive functions (subject to regulations and the direction of Minister), such as the provision of education, roads and hospitals. These functions are very similar to those at present vested in local councils. It will also have power to make by-laws in relation to these matters, subject to the approval of the Governor-General, and to levy a poll tax, subject to like approval. Finally, certain funds will be vested in it. The regional authority is to be composed of elected representatives from the chiefs and councillors of the tribal authorities within its area.

The local authority with the widest area of jurisdiction will be the territorial authority, to be established in respect of the areas of two or more regional authorities. Its members must be elected from amongst the members of the constituent regional authorities. The territorial authority will have such of the powers vested in its constituent regional authorities, as are assigned to it, and the latter authorities' powers will *pro tanto* be diminished.

The Minister may appoint officers of the public service to act in a supervisory capacity in relation to a regional or territorial authority. Such officers will have the right to speak at meetings, but not to vote.

If a regional authority is established for all the areas under the jurisdiction

of a local council, that council will cease to exist; and the same applies to a territorial authority in relation to a general council.

The Government's intention (*vide* the second reading speech of the Minister of Native Affairs, Dr. the Hon. Senator H. F. Verwoerd, *House of Assembly Debates*, 18th June, 1951, cols. 9807 ff.), is to proceed very slowly with the application of the Act; it does not at present envisage the abolition of existing local and general councils.

SOUTH-WEST AFRICA

The South-West Africa Affairs Amendment Act, No. 23 of 1949, amended the South-West Africa Constitution Act, No. 42 of 1925, by abrogating the powers of the Governor-General to legislate by means of proclamations over the territory. Full power to make such proclamations had been given by the Treaty of Peace and South-West Africa Mandate Act, No. 49 of 1919. This year the South-West Africa Affairs Amendment Act, No. 55 of 1951, has restored certain of the legislative powers of the Governor-General, namely, to issue proclamations covering the topics withheld from the Legislative Assembly of the Teritory under section 26 of the principal Act of 1925. The main matters under this head are native affairs, railways and harbours, the public service, justice, postal services, police and military forces, immigration, customs and excise, and currency and banking.

The Act of this year also contains special provisions regarding the Caprivi Zipfel. The Zipfel has not been dealt with in the legislation of 1949. Its eastern portion is almost cut off from South-West Africa, and in fact in the past has been administered by the Union authorities. The new Act vests full power in the Governor-General to make laws applicable to the Eastern Caprivi Zipfel, and the Transvaal Provincial Division of the Supreme Court and the Attorney-General of the Transvaal will now exercise jurisdiction over that area.

NOTES

On September 1, 1951, the death occurred at Davos, Switzerland, of Professor Ernest Delaquis, Secretary General of the International Penal and Penitentiary Commission in Berne from 1938 until 1949. He was a Swiss, born in 1878 in Alexandria. With him went one of the last of the brilliant group of pupils of the late Professor von Liszt in Berlin, who left their mark on modern criminal legislation in almost every Continental country. After the first World War, Professor Delaquis worked in the Swiss Federal Administration of Justice; before and after that he held chairs in the Universities of Frankfurt and Hamburg. He left Germany after Hitler had come to power and worked in Switzerland for international co-operation in penal reform. For him, the International Penal and Penitentiary Commission should be the "conscience" of the nations' penal policy. His own contribution to legal literature had been mainly concerned with the antagonistic twin problem of protecting society against persistent crime and enabling the ex-prisoner to attain social and legal rehabilitation. Professor Delaquis was deeply rooted in the traditional literature and culture of his beloved Switzerland and at the same time devoted to work in the international field, a kind and skilful negotiator at the conference table and a helpful and sympathetic colleague.

M. G.

The *Revue critique de Jurisprudence belge* (Etablissements Emile Bruylant), continues to provide, along with annotated reports of some very interesting cases, critical summaries of the case law of the last ten years. In the fourth quarterly number for 1950, the summary is of Private International Law, in the first number for 1951, of Bankruptcy and Deeds of Arrangement. The annotated cases concern for the most part problems with which English lawyers are perfectly familiar, such as workmen's compensation, covenants not to compete associated with sales of goodwill, the extent to which a servant must be implicated in an illegal business

for him to be debarred from enforcing his contract of service, etc. The Review retains the high standard of performance and usefulness that has already been noted in this journal.

THE comparative lawyer will find much to interest him in recent numbers of the *Canadian Bar Review*, especially the articles by M. Jean Turgeon, K.C. (January, 1951), "De la Revision du Code civil québecois" and by the Hon. William J. Palmer (March, 1951), "Patterns for Jury Instructions." The former is a reasoned appeal, fortified by much discussion of detail, for a systematic revision of the Code, now very much out of date at many points. The latter describes a plan at work in the Courts of California by which patterns are officially published of instructions that judges may be asked to give to juries in negligence cases and in all trials for serious crimes. The author, a Judge of the Californian Supreme Court for Los Angeles County, and the principal author of the scheme, claims that it has saved much time and energy, but disclaims any desire to subject such instructions to a rigid standardization. A Roman lawyer feels tempted to ask if this is not the old formulary system back again, with prearranged patterns capable of modification in proper cases.

WE welcome the appearance of a new review from Montevideo, Uruguay, the *Revista de la Facultad de Derecho y Ciencias Sociales*. Each number contains a number of articles, a survey of the case law on a single topic or group of related topics, reviews, a review of reviews, a chronicle of recent events and a reprint, in the original Spanish or a Spanish translation, of an important foreign enactment, e.g. the Italian Constitution of 1947. The first number for 1950 contains the addresses and discussions which took place in September, 1948, at "Las Jornadas Franco-Latino-americanas de Derecho Comparado de Montevideo," of which the most interesting to the English lawyer is Professor Couture's address on the future of codification and the common law on the American Continent. It seems a pity that we should not emulate the French in establishing at least some sort of liaison with the lawyers of a country that has such close relations and so great a political affinity with our own. The articles in this review show that Uruguayan lawyers are by no means uninterested in English law.

THE *Tulane Law Review* is always of interest to comparative lawyers, and the following choice of articles for mention represents therefore a subjective point of view. Professor Couture of Montevideo (December, 1950) gives a brilliant exposition of civilian theories of "The Nature of Judicial Process," to which he adds his own theory, in which an acute sense of the "rhythm" of civil procedure is balanced by a most canny attention to realities, derived partly from his acquaintance with Anglo-American law. In the April, 1951 number, Professor F. F. Stone prints his paper presented to the Third International Congress of Comparative Law at London in August, 1950, on "The End to be Served by Comparative Law." In the June, 1951 number, M. Marc Ancel gives an authoritative account of "The Revision of the French Civil Code" by the distinguished Committee of which he is a member. A report on the revision by R. A. Pascal from the point of view of a Louisiana lawyer appears in the February, 1951 number. He warns would-be revisers of the Louisiana Code against undue reliance on what may come out of the French discussions. Louisiana is, he says, no longer a State of pure civil law and the main agency of legal development is not the legislator but the judiciary.

A RAPID perusal of the numbers of the *New York University Law Review from* July, 1950, to April, 1951, which include a Survey of New York Law for 1949-50, a Frederick William Maitland Centenary Issue, and an issue In Honor of Sidney Post Simpson, confirm's one's impression of the immense amount of serious legal thought that is going on in the United States, and the great value of the best American law reviews. It is especially worthy of remark not only that American scholars are playing a very serious part in the research into the history of English law, but that by degrees a great mass of secondary material is being accumulated, often without any marked historical intention, which will help to fill one of the biggest gaps in the history of law, namely the history of law in the United States. In this sense attention may be drawn to Professor A. W. Scott's article (April, 1951) on "Charitable Trusts in New York," Mr. L. B. Boudin's (April, 1952) on "The

Settler Within our Gates," and Miss R. Nealon's (October, 1950) on "The Opinion Function of the Federal Attorney General." In the July, 1950 number are four articles of interest to comparative lawyers: by Lord Chorley on "More Thoughts on the Problem of Trial," by Professor J. N. Hazard on "Soviet Socialism and Private Enterprize," by Professor B. Schwartz on "Procedural Due Process in Federal Administrative Law," and by Professor Julius Stone on the Australian Commerce Power.

Dr. Ernst Rabel.—Any pronouncements from one who is so experienced in the laws of different countries as Dr. Rabel, and so much concerned over a period of years with problems of unification, must be worth reading. He has spoken twice recently, once in the *Louisiana Law Review* (Vol. X, Nos. 1-4) and again in the *Zeitschrift für ausländisches und internationales Privatrecht,* usually cited as *Rabels Zeitschrift* (16 Jahrgang 1951 Heft 3). The four articles in the former Review have been reprinted under the title "Private Laws of Western Civilization." They are mainly devoted to an exposition, for the benefit of American law students, more especially those studying the mixed civil-common law system in force in Louisiana, of the leading systems of law prevailing on the Continent of Europe and of their differences from and resemblances to the common law systems of England and the United States, together with some suggestions for a world law based on a rapprochement between them. They are of course valuable on all accounts, but a comparative lawyer of a younger generation may find most attractive the characterizations which, from the ripeness of his own experience, Dr. Rabel gives of the French, German and Swiss Codes, characterizations which are informed throughout by an intense though discriminating sympathy with all these Codes, and with the nations which they govern. There is also much to be learnt from his considered opinion, which is fast becoming orthodox among those who are reasonably well informed on such matters, that the superficial differences between the civil law and common law systems are greatly outweighed by their fundamental resemblances. It is to be hoped that this reprint will be put on sale and have a wide circulation. There is nothing quite like it anywhere, and I can imagine no better instrument for introducing a student to the realities of the subject.

In his German article (*Deutsches und amerikanisches Recht*) Dr. Rabel develops in greater detail his thesis of fundamental resemblance and also pleads strongly for a cross-fertilization between the two great groups of law, emphasizing perhaps less the inventiveness and freedom from inhibitions of American law than the thoroughgoing analysis which was the great achievement of German legal science, more particularly at the hands of the Pandectists. I believe there is much truth in what he says, and I can easily see why, without unduly depreciating the merits of French and English law, he chooses German and American law for his purpose: French law is not so systematic or so self-conscious in its analysis as German law, and English law seems, at first sight at least, to be more tied up than American law by the doctrine of precedent and by the strict interpretation of statutes. But, with the centre of gravity shifting to public law I have some doubt whether any common law country has much to learn from German analysis. Both terminology and categories will inevitably be determined by the subject-matter of the legislation, which will not be legal in the same sense that private law is legal; and the most important practical question, the extent to which legislatures shall legislate in detail and not merely provide a skeleton for the administration to clothe with flesh and blood, is likely to be answered by considerations of politics and national tradition. In any case the flesh and blood are likely to be supplied, in the form of regulations and orders made by administrative authorities rather than of interpretations by the courts. As for private law, I expect more from the steady improvement of textbooks than from codification, the formulation of rules and principles in diffuse and unauthoritative rather than concentrated and authoritative form. In other words, I am inclined to think that we have more to learn from German juristic literature than from the Civil Code. But there is room for experimentation on all lines.

F. H. L.

The South African Law of Obligations.[1]—Roman-Dutch law is one of the few varieties of Civil law that have remained uncodified, and the question is bound

[1] *The South African Law of Obligations.* By. R. W. Lee and A. M. Honoré (editors) and L. R. Caney, K. C., G. Gordno, K.C., Hon. T. E. Dönges, K.C., Hon. F. A. W. Lucas, and R. S. Welsh. (Durban: Butterworth & Co. (Africa) Ltd., 1950). lii—250—[24] pp. 50s. net.

to be asked whether this state of affairs should continue. The disadvantages attaching to it are serious, more serious than in the sister system of Scots law, for the authorities to which reference must be made if the invasion of English law is to be resisted are old and out of date and written either in Latin or in seventeenth century Dutch, both of them languages which present difficulties to the average practitioner in South Africa. There is therefore much to be said for a formulation of the law which, while preserving the contents of these old books, will render continued reference to them unnecessary.. Professor Lee has long been at work on parts of a "code" and has now, with the aid of his co-editor, Mr. Honoré, and several distinguished practitioners, published the books constituting the General Part and the Part dealing with Obligations. It is a separate and complete work, but the editors say that they "do not abandon the hope of completing the work in a second volume which would include the Law of Property, the Law of Succession and the Law of Persons."

This is not the first time that Professor Lee has taken part in a task of scientific but unauthoritative codification, for he was responsible for the part dealing with Contract in Jenks's famous *Digest of English Civil Law,* and he has always kept in touch with that work in its later editions. He has taken Jenks's *Digest* as his model for his codification of the South African law of obligations, which means not only that he has adopted the same style of exposition and even on occasion the same words, but also—what is far more important—has observed the same scale. Since Jenks's *Digest* was drafted on the same scale and according to the same general order of treatment as the German Civil Code, Professor Lee's Code is, as it were, the grandchild of the German Civil Code. This explains a number of peculiarities which might otherwise be difficult to understand.

In the first place, the book which deals specifically with the law of obligations and which amounts to almost the entire work, has prefixed to it thirty-two pages entitled "General," in which are discussed Persons, Acts, Extinctive Prescription and Time. They represent the General Part of the German Civil Code, though much curtailed, since they comprise less than half the number of sections. One of the most remarkable achievements of the nineteenth century school of Pandectists which was crystallized in the German Civil Code was a scheme of successive generalizations by which notions of an increasingly general character were, so to speak, factorized out and made as scientific and uniform as possible. Thus, in addition to a body of doctrine applicable to all species of obligations, there appeared another body of doctrine applicable to all species of acts-in-the-law. A common feeling that both generalization and factorization had gone too far to be either accurate or practically convenient led to many attacks on the General Part of the Code, and in the last edition of Jenks's *Digest* it was pared down to a minimum. Perhaps even so it was too generalized to be perfectly in accord with English law. It is interesting to note that Professor Lee has retained it on a scale less than the German, but still ample enough. Even so, I am inclined to think that the generality of the rules relating to acts is somewhat of a façade: one constantly finds among them rules that are expressed to apply to contracts alone.

Secondly, although the "code" purports to state only the law actually in force, and not what the compilers would like it to be, they have tried to give it the proportions and balance of a true code. That means that inevitably they have filled in gaps by reception of rules derived from English law or books of Pandektenrecht for which there is no conclusive South African authority; but they have also been forced to dilute the law considerably in places where it has been developed in great detail by the courts. Thus at times they give by no means all the law, whereas at other times they give what a hard-bitten case-lawyer might say was not law at all. Perhaps this matters a good deal less in South Africa than in England, the submission to precedent being less abject and the eclectic nature of the law fostering a willingness to find one's law in all kinds of sources.

Since the general scale of the "code" is very much the same as that of The German Civil Code and Jenks's *Digest,* it is interesting to note where they diverge. There is, of course, nothing corresponding to the awkward detail relating to form and consideration in contracts; but this is made up for by a fairly detailed treatment of donation, which does not come as such into the English law of contract, and of leases, which with us would be a matter of property. Quasi-contract is fuller, as might be expected, than in English law, but also, as might not have been expected, than in German law. It has, that is to say, a wider scope than in English law, but

it is not so susceptible of compendious treatment as the more generalized German law. The scale of torts, on the other hand, is midway between German and English law, 118 sections as against 31 and 315 respectively. Doubtless the German law is more ample than this, since some of the relevant rules are to be found in the part of the Code which deals with the general law of obligations; but one cannot bring all the sections contained in the Code up to more than 50. Moreover, the important rules governing strict liability found in special statutes such as that dealing with motors, have no real parallel in South African law. It is easy to see why the South African sections should be only about a third as numerous as the English: the law is by means so complicated and is based much more on a thread of principle derived from the old Roman actions for *iniuria* and for *damnum iniuria datum*. They are more numerous than the German partly because complications have been introduced from English law which make the South African law to quite a fair extent a law of nominate torts, but partly because a good code of torts ought to contain more detail than the German does.

One other general reflection suggests itself: South African lawyers have on the whole been pretty canny in their choice of legal rules, and it is accordingly interesting to note where they have gone for them. It is very striking that whereas they have gone to English law for the details of their law of torts, in contract the particular contracts still belong on the whole to the civil law, but the general law has been very greatly influenced by English law, always excepting our two awkward specialities, consideration and our rejection of the *jus quaesitum tertio*. But what fatal attraction was there in the Statute of Frauds that made it acceptable to the people of Natal?

One who is not a specialist on South African law dare not dispute the formulations of experts such as these; but he is entitled to ask whether the "code" reads well. I have no fault to find here. The style is clear, elegant and consecutive. The English is not draftsman's English and it is not more technical than is absolutely required by the nature of the subject.

Authority is given for every statement, the sections of the "code" are, where necessary, amplified by notes, and there are full tables of statutes and cases and a detailed index.

The book should be in every law library and one is tempted to say that no practical English lawyer should handle a case, at any rate where the English authority is not complete, without seeing if it has any contribution to make.

F. H. L.

South African Law Journal.—Professor Price has completed his series of articles on Aquilian liability for negligent misrepresentation in 67 S.A.L.J. 411 and 68 S.A.L.J. 78. Criminal lawyers may find something of interest in T. B. Barlow's digest of the law of murder and culpable homicide in 67 S.A.L.J. 393 and 68 S.A.L.J. 57. But perhaps the feature of the greatest interest is Mr. Mulligan's development of the theme of restitution and restitutory damages. There are two articles touching on this—one on the scope of the actio redhibitoria at 67 S.A.L.J. 343 and one entitled "No orchids for misrepresentation" in 68 S.A.L.J.157. The latter argues that quanti minoris (restitutory) damages are available as an alternative remedy for innocent misrepresentation inducing a contract, when rescission is impossible or inequitable. This contrasts with the view expressed by De Wet in his book on Kontraktereg that innocent misrepresentation has no effect at all on a contract. As usual the trouble has been caused by the mixture of Roman and Anglo-Saxon notions. The distinction between representations and warranties appears to come from the common law. It may be too late to turn our back on it now.

A. M. H.

Italian Administrative Law.—For some time past English lawyers have recognized that they may have something to learn from the administrative law of the Continent, but they have been apt to assume that French administrative law has been universally adopted as a model, and that a study of other systems may properly be dispensed with. It is many years since Professor J. H. Morgan advised us to study German administrative law as well, but his advice has hardly been

followed. Perhaps we should do better to look seriously at Italy instead of Germany, for Italy is a meeting point of French and German influences, it is a country of fairly long parliamentary traditions, unhappily interrupted for little more than twenty years, and Italian jurists are second to none in learning, finesse and practical good sense. It is also worth noting that, at one time, Italy followed England, not merely in adopting parliamentary institutions, but also in entrusting to the ordinary courts the decision of claims brought by citizens against the administration, and that this practice is still followed where what may strictly be called a "right" of a citizen has been infringed. But at a later date the Consiglio di Stato was given jurisdiction in cases where what was at stake was not a right but an *interesse legittimo*. Thus the Italian system is midway between the French and the English systems: Italian jurists have felt the same repugnance as Frenchmen to any interference with the administration by the courts, but they have seen no reason why the ordinary citizen should be deprived of his regular remedy in the ordinary courts merely because the person who has wronged him is an administrative authority. German administrative law is a mixed system of somewhat the same kind, though it would seem that the jurisdiction of the administrative courts is not so general as in Italy.

Professor Zanobini's large book[1] is now the leading authority on Italian Administrative Law; and a perusal of it makes one wonder whether something of the same kind could not be attempted here. The nearest we have to it is, I should suppose, Hart's *Introduction to the Law of Local Government and Administration*, but it is neither so complete nor—as might be expected of an English law book—so philosophical in spirit. Moreover, Italian law does not know our distinction between central and local government, with its attendant distinctions between civil servants and local government officers and between crown proceedings and proceedings against local authorities.

The lack of an administrative code need not deter us, for what Italian publishers call a code is, here, not an administrative code but a collection of enactments on administrative law (*Codice delle leggi amministrative*), and of only the most important ones at that. Moreover, Professor Zanobini, who is also one of the compilers of the leading collection, says quite frankly that it would not be worth while to enact an administrative code, for its contents would be constantly changing. He also says—and for this one could easily find authority in Germany also—that administrative law is extraordinarily copious and fragmentary in the majority of states. It might be possible to enact a code containing the general principles governing administrative law as a whole, but for the rest one would have to content oneself with consolidations of the laws on different topics. We should not be inclined to adopt a code of general principles, but is our position very different as regards such topics as National Insurance or Public Health?

A perusal of the *Codice delle leggi amministrative*[2] suggests another question. We are accustomed to say that our statutes are much more detailed than Continental statutes. Doubtless they are more voluminous than French statutes; but I notice that the Italian consolidated Act of March 3, 1934, on communes and provinces contains 427 sections, to which must be added the 205 surviving sections of the consolidated Act of February 4, 1915 on communal administration. The consolidated Public Health Act of July 27, 1934, contains 394 sections. A detailed comparison would be necessary before one could draw accurate conclusions, but these Acts *look* as though they were on the same scale as our Acts on the same subjects. Perhaps a little statistical work of a comparative character would teach us a great deal about our own and other people's laws. Even without any research on those lines, an English lawyer may sometimes feel dissatisfied when he compares the thirty-two volumes of our new set of Revised Statutes with the one-volume compendia which most Continental countries contrive to produce every year. It will be interesting to see whether the heroic attempt at all-round consolidation which we are now making will materially reduce the volume of our statute law.

F. H. L.

[1] *Corso di Diritto amministrativo*. By Guido Zanobini. (Milano: Dott. A. Giuffre.) Vol. I (6th ed., 1950): Principi generali, 264 pp. Lire 1320. Vol. II (6th ed., 1948): La Giustizia amministrativa, 322 pp. Lire 1100. Vol. III. (4th ed., 1949): L'Organizzazione amministrativa, 328 pp. Lire 1320. Vol. IV 3rd. ed., 1948): I Mezzi dell'Azione amministrativa, 365 pp. Lire 1100. Vol. V: Le principali Manifestazioni dell'Azione amministrativa, 431 pp. Lire 1650.

[2] *Codice delle Leggi amministrative*. Compiled and edited by Guido Zanobini and Giuseppe Cataldi. (Milano: Dott. A. Giuffre, 1948.) iv—1376 pp.

THE publication of the first volume[1] of the Annals of the Faculty of Law of the University of Istanbul[1] is an event warranting an extended notice.

The Istanbul faculty has for a long time now published in Turkish a quarterly review which plays a leading role in Turkish legal science. The difficulty of the language has, however, resulted in its being little consulted abroad. The new publication accordingly is to be compiled in one or other of the main European languages, the present volume containing articles in English, French, German and Italian.

The object of the Annals, as stated by the Dean, Dr. Huseyin Nail Kubali, in his most interesting preface, is twofold. First to afford to foreigners a reasonable opportunity of obtaining information concerning the main developments in Turkish law; and secondly to enable Turkish jurists to play their part more effectively in the advancement of legal knowledge and science generally.

This reviewer may be permitted to underline the especial interest today of the study of legal developmnets in Turkey, particularly when that study is approached in a spirit as candid and impartial as that of Dr. Kubali and his colleagues. As is well known, after the Ataturk revolution and particularly during the course of 1926 and 1927, there was in Turkey a more or less wholesale reception of foreign, that is to say European, law taken mainly from the Swiss Codes, then regarded as the best example of their kind. Though Dr. Kubali is no doubt right in suggesting that this Europeanization of Turkish law had long been prepared by a continuous historical process dating from the middle of the nineteenth century, it is indubitable that the actual reception in 1926 constituted a serious shock to the nation. The question of critical interest, and of an interest by no means limited to jurists and lawyers, is to discover and to appreciate the real effect of that shock, the objective results of this confrontation and joinder of Turkish national habits and customs with the elaborate regulations appropriate to and conditioned by a West European society.

It reflects great credit upon the intellectual integrity and upon the acumen of Dr. Kubali and his colleagues that it is to this question precisely that they direct their attention. The terms in which Dr. Kubali frames the question are so admirable that they deserve citation:

> "Dès lors, il est d'un très vif intérêt de rechercher dans quelle mesure cette superstructure de droit positif d'origine européene . . . put s'adapter à l'infrastructure nationale qui est, sans doute, soutenue, malgré tant de changements profonds, par une continuité historique inévitable. Aussi est-il curieux de savoir quelles sont l'efficacité respective et l'influence réciproque de ces structures et comment enfin s'annonce la valeur de la synthèse qui doit se produire tôt ou tard entre ces différents facteurs de civilization dans le creuset de l'âme nationale."

Instead therefore of entertaining us with speculations in the void about abstract principles of law which in any event would be not unfamiliar to West European jurists, Dr. Kubali and his colleagues offer to discuss with us, "avec toute l'objectivité que la probité scientifique exige," a pressing and most grave actuality, one whose scope extends far beyond Turkey and indeed embraces the Asiatic and the Eastern world in general: the real effect of the reception of Western principles into a non-Western matrix. It should be noted not only that law is probably the best instance which may be selected for the most effective study of this critical problem, but that it would be difficult to imagine a locality more apt than Turkey to this enquiry. For Turkey both has a settled and profound national consciousness entirely its own and also, at the same time, has truly determined to accept Western principles not as an adventitious ornament, but as part and parcel, so far as they can be received, of its way of living. It is no small thing that a nation which long had had a tradition of autocratic rule should accept a democratic constitution; it is, I venture to believe, positively startling that it should so have received those principles that a government established with a large majority should actually be ousted as a result merely of the holding of a general election. It seems evident that the Turkish nation is seriously and soberly endeavouring to make a true fusion of Eastern and Western notions; and the undertaking is one which should command, and deserves, the most careful attention of enlightened persons generally and in particular of

[1] Annales de la Faculté de Droit d'Istanbul. No. 1—1951. (Galata-Istanbul: Imprimerie Fakülteler Matbaasi.) 400 Kurus—500 French Francs.

lawyers—more especially now that the valuable aid of this new series of publications is promised.

The first number makes it clear that there is already more than a mere promise of performance in the future. The Annals begin (pp.1-42) with an English translation—of which, however, the English leaves something to be desired—of the report prepared principally by the Turkish Institute of Criminology under the direction of Dr. Tahir Taner, who is also professor of Criminal Law at Istanbul, upon the prevention and treatment of juvenile delinquency in Turkey. The report was composed at the invitation of the Division of Social Activities of the United Nations. It is interesting to observe that at the outset (pp. 5-7) the reporters emphasize the effect upon juveniles of the "radical change and revolution which has just been completed" and state that "it is impossible to apply without reservation the factors and causes of juvenile delinquency found in a well- and long-formed and stable society" to the situation existing in Turkey, where other causes are also in operation. They note, for example, the very small proportion of juvenile offences committed against property: in rural areas such offences constitute only 8.35 per cent. of the total amount of juvenile criminality, whereas the increase of manslaughter in the same areas is striking. The report states that out of 974 young criminals examined, 522 had been convicted of manslaughter. A sexual element was often prominent in the cases examined and many could be attributed either to the persistence of the notion of the blood feud or to a sense of "honour" which was not satisfied by the sanction attributed by the law to the alleged transgressor's act. Some appreciable proportion of juvenile delinquency is due to a discrepancy between the law and recognized social morality: the report states (p. 33) that it may well happen that "the child believes that it is his duty to kill to live a decent and honourable life in his village." The investigation is still proceeding: these excerpts may however show not only the intrinsic merit of the enquiry but the impartial and objective attitude of the reporters.

The second article, in French (pp. 43-71) on "Les Facteurs Sociaux de la Criminalité en Turquie" is by Dr. Nurullah Kunter, assistant professor of Criminal Law at Istanbul and a member of the reporting committee above mentioned. He gives an account of the studies already completed in Turkey on this matter, and then proceeds to set out a series of most interesting statistics which serve to illustrate the effect of various social factors on criminality, with special reference to homicide and juvenile delinquency. He summarizes his conclusions at pp. 68-71 and shows that beside the sense of "honour" and the persistence of the blood feud already noticed important contributory factors of criminality, and especially of homicide in rural areas, were the continuance of the custom of marriage by abduction and a spirit of pure braggadocio, the remnant no doubt of the "Palikari" tradition.

The third article, also in French (pp. 72-101), by Dr. Mahmut Belik, the "docent" in Public International Law at Istanbul, concerns "Le Traité d'amitié, de conciliation, et de règlement judiciaire entre la Turquie et l'Italie" concluded on March 24, 1950. It is of a more purely factual and informative sort than the others, and sets out the text of the Treaty; but it enquires into the sense of the reservations contained in article 3, especially, of the Treaty and gives some account of the present Turkish attitude both to International Law and to the International Court of Justice.

The fourth article (pp. 102-118) by Dr. Ilhan Postacioglu, the "docent" in civil procedure, entitled "De la restriction de la preuve testimoniale dans les droits turc, français et italien comparés" is again a most valuable investigation into the process of adaption of a rule of foreign law into the social circumstances of the adopting country. The rule in question, the exclusion of oral testimony, is derived mainly from the French civil code, and is to be found in the Italian codes though there its rigour has recently been much attenuated. Dr. Postacioglu examines in an illuminating manner both the divergence of the French, Italian and Turkish texts and the developments introduced by case law in the respective systems.

This reviewer feels entitled to pass over in this notice, as not being directly concerned with Turkey, the next two articles, in spite of their intrinsic interest, by Professor Henry Laufenburger of the University of Paris on "Economie privée et économie publique" and by Dr. Andreas Schwarz, ordinarius professor of Civil and Roman Law at Istanbul, on "Sir Frederick Pollock und die Englishe Rechtswissenschaft," an article of great merit, though these contributions have importance as indicating the range of interest of the Istanbul Faculty of Law.

The next section of the Annals, which is entitled "Chroniques" and includes a bibliography, contains an account of (a) Turkish legislation in the public and private law fields (specially noteworthy being the Electoral Law of February 20, 1950, and the Law of February 7, 1950, validating certain marriages and legitimating children born of polygamous unions) and of (b) some decisions of the Turkish Court of Cassation, particularly those decisions in which the Court, according to a procedure open to it, settles a disputed point arising from a divergence of judgments amongst its constituent chambers. A case of perhaps special interest is that of January 14, 1948, concerning the legality or illegality of the lease of a brothel, in a case where the brothel is a *maison tolérée* and licensed by the police.

The Annals end with a section entitled "Documents." It contains first, in a French translation, the acts constituting the Turkish Conseil d'Etat, which, first set up in 1927 and reorganized in 1938 with certain modifications in 1946, is assuming an increasingly important rôle in the Turkish political regime. The second document, also in French translation, sets out the regulations governing the Licence de Droit of the Istanbul Faculty of Law and gives a comprehensive view both of the methods of instruction and the subject matters taught, and the manner and scope of the examination. It may be noted that the licence requires at least four years of study.

The first volume of the Annals is as interesting and encouraging a publication in the comparative law field as any this reviewer has recently read. What is perhaps most impressive is the good sense of Dr. Kubali and his colleagues who, avoiding all grandiloquence, have directed their attention and their learning to an investigation which is at once critical and *the* matter upon which their contribution to legal knowledge is likely to be of the most value—namely a factual and scientific enquiry into the actual state of Turkish law not as an abstract body of rules, but as the evolving amalgam in the living Turkish society of principles derived from West European civilization with autochthonous customs and traditions. The problem they seek to investigate is today a crucial one: it extends far beyond Turkey and embraces many fields other than that of the law. Their work constitutes an important addition to comparative legal studies; and their first assay is of the best augury. Many besides lawyers will follow with the closest attention their future progress.

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NOTICES OF BOOKS

INTERNATIONAL LAW

The second edition of Dr. Schwarzenberger's *Manual*[1] is brought up to date, but substantially unaltered. There now also appears the companion volume of cases, edited by Mr. Green.[2] (Both books form part of the Library of World Affairs.) Since it is a companion volume, the selection and order of cases is that of Dr. Schwarzenberger: there are included all those which are singled out in his Study Outlines as being of major significance, together with a handful of very recent decisions which are not yet mentioned there. Of the total of some 170, a dozen are from American or Canadian municipal courts (and one from Scotland), seventy from the World Court and other international tribunals, and the remainder from English courts.

A casebook of International Law presents a particularly intractable problem. On the one hand it is more than usually necessary because reports of international tribunals are often hard to come by, and when found are not easy for the beginner to digest, and on the other, the very length and number of the judgments present great difficulties of selection. To reproduce in full even one judgment is obviously impossible within a reasonable compass. Pitt Cobbett chose the method of summarizing the decisions briefly in his own words, and stringing them together with a

[1] *A Manual of International Law.* By Georg Schwarzenberger. 2nd Ed. (London: Stevens & Sons Ltd., 1950). Pp. lii and 428. 25s.

[2] *International Law through the Cases.* By L. C. Green. (London: Stevens & Sons Ltd., 1951.) Pp. XXVIII and 913. £3 15s.

commentary. Mr. Green, since his collection is ancillary to a textbook, which, moreover, encourages the student to stand on his own feet, eschews the commentary and applies to the cases the scissors and paste method of, for example, Cockle and Hibbert. The scissors are cleverly used and the omissions conscientiously indicated. Which method is the better will remain a matter of opinion. It depends largely on how much is cut out. If all that is left is disconnected sentences, a coherent summary is preferable; both will give no more than the editor's view of the essentials of the case. In this respect the international cases fare better here than the English. On the other hand, in the more important English cases excerpts from more than one judgment are often given, whereas in the international cases (with one special exception) the majority judgment alone is represented, a list of the dissenting judges being added, with very occasionally a sentence about the ground for dissent. This is particularly unfortunate, for example, in the recent S. W. African case (which with commendable promptitude is included here). The objection to including dissenting opinions is obviously the lack of space; but the book is already so large that its price is likely to deter most students from buying, and if it is to be mainly a library book it would be better to cut out the English cases, or at any rate those decided since the beginning of the official Law Reports, which occupy between a quarter and a third of the space in the book. This would enable more justice to be done to the international cases which the student will often not find in his library.

For a heavy book which is likely to be much referred to, the binding seems rather flimsy.

BARRY NICHOLAS.

THE AUSTRIAN PENAL SYSTEM

SINCE Donnedieu de Vabres' notable precedent there has been a growing tendency in recent treatises on criminal law to discuss the municipal law against a background of comparative observations on other legal systems. While little has been done so far in the way of comparative studies on particular offences and their legal ingredients, and a good deal remains still to be done in such general topics as conditions and degrees of criminal responsibility, the modes of penal and corrective treatment have been a subject of international discussion for more than a hundred years. The present two parts of new Outlines of Austrian Criminal Law[1] deal with punishment and measures of public security. This juxtaposition is typical of Continental jurisprudence with its emphasis on abstract conceptions and consequent controversies on the merits of a "single- or double-track system" of legal sanctions. The present Austrian penal system has still as its statutory basis the Code of 1852 which took over many characteristics from the preceding Code of 1803. With its variety of punishments involving a deprivation of liberty, "the coinage of retribution" (52) intended as a qualitative differentiation in severity, with its predilection for separate confinement, its police surveillance, and its insufficient provisions against persistent offenders, Austrian law is lagging behind modern ideas. Capital punishment was ended on June 30th. 1950 (after the publication of this book), when the Austrian Parliament rejected a Government motion for the extension of its temporary retention. Austria has model statutes on Conditional Sentences (1920) and the Treatment of Young Offenders (1928). The book not only describes the origin and present state of the law, but exhibits also a critical attitude emphasized by numerous references to the literary discussion and by most valuable comparative notes on such topical subjects as capital punishment, prison system, civil disabilities, and preventive measures. Detailed information is given especially on Switzerland, Italy, Sweden and England where much attention has been given to the recent Criminal Justice Act.

For the continuation of this book one would like to see the same amount of information about non-Austrian law, while the comprehensive footnotes with literary references should be limited to a more rigid selection of essential contributions. It would be wrong to expect a survey of indiscriminate perfection when research in comparative criminal law has just begun. As to the causes of crime, W. Healy is not a follower of the milieu-theory in the sense of the Lyons school (15). John Howard, though often described as an advocate of solitary confinement, himself refuted

[1] *Grundriss des Oesterreichischen Strafrechts. Allgemeiner Teil.*, 2. *Hälfte* (*Strafe und Sicherung*) 1. *und* 2. *Lieferung.* By Max Horrow. Leykam Verlag Graz-Wien, 1950. 128 pp.

this assertion in a footnote to his account of Reading Bridewell; solitary confinement for a long term, he declared, "is more than human nature can bear without the hazard of distraction or despair." The 19th-century development of a model cellular system in Belgium (41) has been followed by notable experiments in classification after the first World War.

The present parts of the book are mainly dealing with penological questions. Other parts are intended for a discussion of the legal aspects of crime under Austrian law. In this respect the classic textbook on Austrian criminal law by Professor T. Rittler has set a high standard for any new literary project.

M. G.

THE REFORM OF THE LAW[1]

Professor Glanville Williams has combined with a number of other contributors, including Dr. Hermann Mannheim, the late Harold Laski, Lord Chorley, Robert Pollard, Stephen Murray and R. W. Somerville, to produce a miscellaneous collection of proposals for law reform, ranging from the establishment of a Ministry of Justice through various branches of Public and Private Law to the reform of Legal Education. There can be no doubt that what they have produced is useful, as much from the merits of the individual suggestions as from the fact that it brings together for the first time in many years much of what, though familiar to most lawyers, is not easily tracked down to one publication or other. It contains, along with proposals of a more academic kind dealing with the general structure of the Law of Contract and Torts, many very detailed suggestions relating to such topics as Industrial Law, Leaseholds, and Family Law. In many places regard is paid to the comparative study of other legal systems, and in general it is clear that the proposals have been carefully thought out and have behind them the backing of much practical experience. Unfortunately the book suffers from what would appear to be serious imperfections. While many of the proposals it contains would meet with general acceptance not only among informed laymen but also among lawyers, there is much that fairly obviously belongs more properly to a party programme; and a possible effect of the mixture may be to make the book as a whole appear acceptable only to persons who share the party predilections of the authors. It would probably have been better had the two types of recommendations been kept apart, and if the more controversial of them had been vouched for by individual authors. As it is the book often appears pontifical in its anonymity and the reader who is not an expert on a particular topic such as leaseholds does not always quite know when he is passing from territory which is common ground to most persons whose opinion is worthy of consideration, to matters which give rise to considerable doubt. What we really want to know very seriously and very urgently is how much law reform of a vital nature could be got through easily without controversy and without expenditure of parliamentary time. Otherwise the effort taken up in controversy by no means fruitless will get in the way of what can be done without any controversy at all. The general impression I get is that the authors—or some of them, it is not easy to be certain on this point, so anonymous is the book—would rather fight than win without a fight. I think too that it is unfortunate that the authors should try to link up all, or at any rate most, of their proposals to their major proposal for the establishment of a Ministry of Justice. This is a highly controversial proposal and I see no reason whatever why many of us who are anxious for law reform should in effect be told that we shall not be allowed to be satisfied until we swallow this very doubtful pill. The opinion is often expressed in the book in more or less definite form that a Ministry of Justice will give you all the reforms you need whereas you cannot get anything without one, and there is the further suggestion that wherever you get Ministries of Justice you get law reform. But this is by no means certain. When the authors say that there is a Ministry of Justice in every one of the British Dominions they do not seem able to add that in all these Dominions law reform has progressed more favourably than in this country. In fact it is notorious that this is not the case, and that many of the most important reforms in Canada have come from the Uniform Laws Commissioners and not from the Ministry of Justice. This is not to deny that there ought to be some permanent organization entrusted with the duty of keeping the law under constant supervision and of making proposals from time to time for its reform, but there seems to be no reason whatever why such a body should have executive powers or should have anything to do with the appointment of judges. I think many of us

[1] *The Reform of the Law.* Edited by Glanville Williams, pp. 224. (London: Gollancz, 1951.) 18s. net.

would feel that what we really need is a permanent Law Revision Committee with complete initiative to propose reforms and to draft bills, and with a small body of permanent civil servants, to ensure continuity and to build up a departmental tradition and drafting technique. The one advantage one can see that might result from the establishment of a Ministry of Justice would be that a Minister of Justice might have a better chance of securing parliamentary time than a mere commission; but this would depend very much in any case on the calibre of the Minister of Justice, and there is no guarantee that he would be more successful in securing parliamentary time than the Lord Chancellor is at present.

Another doubtful proposal which is, however, not given undue prominence, is that for a systematic codification, but here the doctrinaire impulse is somewhat held in check. The authors recognize frankly that the task of codification would be a long one and they give the impression that they would rather have no code at all than a bad one. My impression is that if their suggestions were carried out they would, in fact, lead to the codification of the law in many places where codification would be of undoubted advantage, and that no harm would be done if they found it impossible to attain agreement on the general parts of such topics as Contract, Tort and Criminal Law where codification would be of very doubtful use.

Altogether the book is rather exasperating. Much that is of very great value jostles with much that is both dogmatic and half-baked; and on the whole a good deal less use is made of comparative law than might have been expected. I rather suspect that apart from its use as a party programme, persons will usually refer to it to see what are the main abuses in those parts of the law with which they are not very familiar.

F. H. L.

ANGLO-AMERICAN AND LATIN-AMERICAN LAW[1]

Mr. Eder, the well-known New York practitioner and expert in Latin-American law has, for a number of years, delivered a series of lectures to Latin-American lawyers studying at the Inter-American Law Institute which is part of the Law Center of New York University. He had previously delivered lectures with substantially the same content in Spanish[2]. The book here reviewed is the English version, to which he has appended a selected bibliography of Comparative Law (Common Law and Modern Civil, especially Spanish and Latin-American Law) arranged in two lists containing English Language publications and Foreign Language publications respectively. The lectures are on the following subjects: I. Introduction and Sources of the Law; II. Unity and Supremacy of the Law; III. Torts; IV. Equity; V. Trusts and Future Interests; VI. General Survey; and VII. Comparative Law. These headings indicate that the author has not tried to give a comprehensive account of either Anglo-American or Latin-American Law but has tried to indicate to his Latin-American audience the most important points where Anglo-American Law has something of value to teach them.

He has done his work admirably; and if an academic lawyer may find a few statements, especially in relation to legal history, with which he might feel disposed to disagree, and if generally he might feel that he could have done better at a number of places, he would have to admit not only that Mr. Eder is a much better academic lawyer than most practitioners, but also that he has said many valuable things that no academic lawyer would have been impelled to say or could have said with authority. Moreover, his qualifications for the task are exceptional. He was born in Colombia and his practice has always brought him into very close practical touch with Latin-American Law. He has been a comparative lawyer in the most practical sense of the word. Incidentally, and more particularly in the last two lectures, he draws attention to many striking characteristics of Latin-American Law, and indeed I can think of no book which could better serve the English lawyer as a general introduction to Latin-American Law. Although the comparisons are made professedly with Anglo-American and not with English Law, the English lawyer will not find that this fact in any way diminishes the usefulness of the book; and, indeed, an English reviewer may be pardoned for noting with gratitude the flattering references which the author constantly makes to English law and to the administration of justice in this country.

F. H. L.

[1] *A Comparative Survey of Anglo-American and Latin-American Law.* By Phanor J. Eder. (New York: New York University Press; London: Geoffrey Cumberlege, O.U.P., 1950. Pp. xii+257. $6.00.)

[2] *Ciertos Principios Caracteristicos del Common Law,* La Habana, Cuba, 1948.

CONSTITUTIONAL LAW

THE well-known book by Professor Wade and Mr. Godfrey Phillips[1] maintains its position as the most comprehensive and most useful book on the constitution. It has not undergone any fundamental changes in the new edition though it is full of new material arising from recent changes in the government of this country. Of all this it need only be said that Professor Wade continues to write with the judgment which we have learned to expect of him and that no sensible person will fail to ascertain what he has to say upon any important problem.

Ridges[2] has undergone a much more serious revision, which was indeeed very much needed. There is no doubt that it has been greatly improved in the process. In particular, Mr. Forrest has omitted much that has no very obvious connection with Constitutional Law, such as, for instance, the history of the judicial system. On the other hand he has expanded very considerably the treatment of Administrative Law. The order which he has adopted in dealing with Administrative Law does not indeed seem perfect and there is much to be said for a still greater expansion at that point. Moreover, Mr. Forrest might have done even better if he had been more drastic in his handling of the material originally introduced into the book by the late Professor Keith. But the book has its place because it is rather more historical in tone than other books on the subject. It is to be hoped that Mr. Forrest will be able to handle it still more freely in a later edition. F. H. L.

ADDINGTON: AUTHOR OF THE MODERN INCOME TAX[3]

THE purpose of this monograph is proclaimed in its title and very amply achieved in its text. Among the conventions of history, few have enjoyed a more widespread vogue than the attribution to Pitt of the invention of the Income Tax. It is true that the statute of 1797 of which he was the author was the first to introduce a direct tax on incomes into our fiscal mechanism. But alike in its methods of assessment and enforcement and in its yield, Pitt's measure proved inefficacious. If due emphasis is given to the word "modern" in the title of this work, there can be no question that its thesis is established and that the system of Income Tax which we now enjoy or endure was first embodied in the statute of 1803, of which Henry Addington, then Chancellor of the Exchequer, was the creator.

The defects of Pitt's scheme are here faithfully exposed and contrasted with the merits of Addington's measure, the novelty of which consisted in the adoption of the principle of "deduction at the source" which to this day is the basis of our Income Tax legislation.

Dr. Farnsworth's documentation of his case is exhaustive and convincingly arrayed, but he does not overstate it. He does not deny to Pitt the fame of having conceived the idea of a tax on incomes and of having thus paved the way to Addington's measure; his concern is to vindicate Addington's claim to have rendered Pitt's idea effective in practice.

It is pleasant in these days when the sport of denigrating the great men of the past is so popular a pastime to meet with an author who has taken upon himself the chivalrous task of rehabilitating a statesman hitherto undervalued, and of doing justice, however tardy, to one who has fared so badly at the hands of historians. No one would claim that taxation is an exhilarating subject on which to discourse, but those who relish a closely reasoned effort of advocacy cannot fail to find pleasure in Dr. Farnsworth's spirited championship of the financial genius of one whom even the Dictionary of National Biography unkindly characterizes as a "mediocrity."

M.

JUSTICE AND ADMINISTRATIVE LAW[4]

THIS is the third edition of what must now be called a famous book; but so much has happened since the publication, in 1947, of the the second edition (which, unfortunately. I did not have the leisure to read) and so much of the book is taken up by descriptions of administrative tribunals, that a full review is required. To be quite candid, the author's mind is a highly individual one which I do not get

[1] *Constitutional Law.* By E. C. S. Wade and G. Godfrey Phillips: 4th edition by E. C. S. Wade. Pp. xxx+535. (London: Longmans, 1950.) 35s.

[2] *Ridges' Constitutional Law:* 8th edition by G. A. Forrest. Pp. xxviii 550. (London: Stevens & Sons Ltd., 950.) £2 2s.

[3] By A. Farnsworth. (London: Stevens & Sons Ltd., 1951.) Pp. xii+140. 21s net.

[4] By W. A. Robson: 3rd ed., 1951. (London: Stevens & Sons Ltd.) 30s. net.

on with very well. I find his method of dealing with things which he does not like, not merely provocative—that is all to the good—but antagonizing. He too often assumes what I should accept only after considering a good deal of evidence and argument; and whilst I am perfectly prepared to forgo the evidence, at least provisionally, where it concerns his personal experiences of the work of administrative tribunals, I should like a fuller discussion, for instance, of the relative claims to consideration of the public and the private interest. I do not think that Dr. Robson's evident prejudice in favour of the former against the latter really makes him go wrong when dealing with special topics or making specific recommendations, but his assumptions certainly show that he is living in a mental atmosphere which is not my own, nor indeed that of many of those whom he would wish to convert to his way of thinking. There is too much dogmatism at critical points in his general argument. Very often in reading the earlier chapters, I felt that what had in the first edition been a brilliant thesis for a doctorate, had not quite matured with keeping or had not received the ruthless revision needed to make of it a classic. Some of the polemics, for instance, against the late Sir John Marriott might be cut.

I think now that, although I must adhere to what I have said, it is by no means the whole truth. In general the book is indispensable and very wise; and I only hope that many others who are inclined to be repelled by some of its features will come to the same conclusion that I have come to. Dr. Robson crystallizes admirably the floating opinions that must be very widely held, and gives precision to many suggestions that others would have made had they given to the subject the attention that he has given to it. There still remain doubts: whether, for instance, Lord Justice Denning is not right in wishing that any administrative appeal tribunal with general jurisdiction should be brought into a closer relation to the Supreme Court than Dr. Robson would like. But I seem to find elsewhere in the book indications that Dr. Robson does not want to fall out with others who, though generally friendly to his suggestions, would want to modify them in detail. I am also not perfectly convinced by his root and branch attack on the attempt of the Committee on Ministers' Powers to set up a separate category of quasi-judical powers; though I agree that logically it is difficult to accept.

Perhaps I ought to mention one or two points, not in order to criticize Dr. Robson for not doing what he did not set out to do, but to warn readers of what they should not expect to find in his book, even in its third edition. It does not in any way profess to be a complete statement of the law. Dr. Robson is merely concerned to state a case, and he states as much law as is necessary for the purpose. Thus he is much more deeply interested in the legislation setting up administrative jurisdictions, and in their composition, their powers and duties and the procedure they follow, than in the cases decided in the ordinary Courts about them. What he gives us. is so valuable that we have really no right to complain of what he does not give us. But I should like to see in a fourth edition some reference to important recent cases such as *B. Johnson (Builders) Ltd. v. Minister of Health* [1947] 2 All E.R.395, and to the difficulty of drawing the line between legislative bodies whose good faith cannot be inquired into and administrative bodies where it can (see the Australian case of *Arthur Yates and Co. Pty. Ltd.* v. *The Vegetable Seeds Committee* [1945], 72 C.L.R.37). It is of course sheer bad luck that the book should have gone to press before The King's Bench Division gave its very important decision in *R.* v. *Northumberland Compensation Appeal Tribunal;* ex parte *Shaw* [1951] 1 T.L.R.270; but I cannot think that that decision can affect the general validity of the author's conclusions.

Further, Dr. Robson does not in any way profess to compare English Law systematically with foreign law, either American or French, and I am not going to complain of his committing a fault which others including myself, have committed, that of pointing in a general way to the superior control exercised over the administration by the Conseil d'Etat. I am willing to believe that in some ways the Conseil d'Etat does work better than any Court we have, but I know that it meets with many of the same obstacles that we meet with and does not entirely surmount them, particularly when the actual merits of a decision appealed from are concerned; and the arrears it has accumulated are not merely appreciable but colossal. In any case I am convinced that we know far too little on this side of the Channel about the actual working of the French system to be in a position to generalize about it. This is eminently a subject for the most detailed research; and if I am not mistaken, the task will not be easy. F. H. L.

HANDBUCH DES INTERNATIONALEN PRIVATRECHTS[1]

Since the second edition in 1943 of this standard treatise on Swiss Private International Law the sections on Nationality and Divorce have been completely revised. Entirely new features of the present edition are the sections on Naturalization (pp. 545-49) and Commercial Contracts, the inclusion of which latter means that, in its international aspects, the whole of Parts I and II of the Law of Obligations is covered in this work, whilst for Parts III-V, dealing with Companies and negotiable instruments, the author's "Handbuch des Internationalen Handels-Wechsel -und Check-Rechts of 1938" must, as before, be consulted.

The author claims some advance since 1943 in the adoption of the characteristic content of the juridical relationship ("der charakteristische Inhalt des Rechtsverhältnisses") as the connecting factor requiring the application to the entire juridical relationship of the law of the place of obligation of the characteristic performance therein ("die Anwendung des Rechts des Schuldorts der charakteristischen Leistung auf das gesamte Vertragsverhältniss" (Preface p. X). The advantages claimed for the characteristic content as the connecting factor in respect, for example, of an international contract, is the application of a single law to the whole contractual relationship which it makes possible, while, as a principle for determining the choice of law, it is the most elastic so far put forward. It is "functional" or "organic."

The characteristic content ("Inhalt") becomes more specifically, in an international contract, the characteristic performance ("Leistung"). The characteristic performance in an international contract of insurance, for example, is that of the insurer in insuring; it is the performance of the party whose services are invoked ("in Anspruch genommen" p. 568): the merchant's services to his customer, the doctor's to his patient, the transport authorities' to the traveller, etc. Reference is made to the case of Centro Cooperacia A. G. v. Reinhardt, 17.2.45 (J.f.Int.Recht V, 1949, 113-114) in which the principle of the characteristic performance was under consideration by the Court. Regrettably, however, the Court did not there require to decide its merits. The principle can be regarded, the author indicates, as a further extension of the English rule (?) requiring choice of the law with which the contract has the most substantial connection and it is at first sight attractive. Yet, in so far as the contracts that may be brought within the application of the principle are standard form contracts, or "contrats d'adhésion," in the sense in which Saleilles coined the phrase, the principle of characteristic performance offers no innovation. In so far as the contracts fall outside the category of "contrats d'adhésion," the present reviewer considers the application of the principle may involve two objections. First. that in many cases the performance of both parties may well be equally characteristic. Second, that even where it is not, a tendency to lean towards the function of the larger and against that of the smaller, of the institution against the individual, of the impersonal against the personal, should be jealously scrutinized. And surely, to adopt functional law wholeheartedly is finally to throw overboard the fiction of law pre-ordained, which, even in these days of rapid evolution, may still have merit.

The arrangement and treatment of the subject matter is, as in the preceding editions, most excellent, and the very readable German style is assisted by the well set Roman type.

E. H. Wall.

NEGLIGENCE IN THE CIVIL LAW[2]

Professor Lawson will add to his reputation by this excellent manual so well produced in the well-tried method of Keir and Lawson's Cases on Constitutional Law. There is a first-rate introduction of some eighty pages in which all aspects of the *Lex Aquilia* and related topics are surveyed in the light of the latest knowledge of Roman and Modern Law; this is followed by the texts of the Digest and the relevant Roman and Civil Law texts and comments. This golden chain of civil law development is well portrayed.

We found the section on Strict Liability, pp. 43-50, of particular value. *Rylands* v. *Fletcher* is rightly considered in relation, not only to articles 1382 and 1384 of the Code Civil, but also in relation to the growth of liability under the Workman's Compensation Act and the theory of *risque créé* of Josserand. Certainly the modern

[1] By Adolf F. Schnitzer: 3rd ed., 1950. (Basel: Verlag für Recht und Gesellschaft.) 2 vols. pp. 900.

[2] By F. H. Lawson. (Oxford: at the Clarendon Press, 1950.) Pp. xvi+341. 25s. net.

industrial accident is often "anonymous"—exceedingly difficult to prove at Common Law, and when it is proved, everything depends on the system employed. Certainly, as the author says, the problem of negligence must today be considered in relation to compulsory insurance in all its forms and the choice of modern Canadian legislation, pp. 306-333 is indeed an interesting example of the comparative method applied to motorists' liability. It is noteworthy that the Belgians are just now considering the compulsory insurance of motorists; Great Britain has, however, moved on from the Workman's Compensation Acts to the Industrial Injuries Act, a significant proceeding.

The author shows how English law followed behind French law in the matter of "common fault" in contributory negligence (p. 57), but how French law has now gone off from "common fault" to hold (with an eye to the third party insurance, perhaps) that each person who has custody of a car must pay for the damage done to the other in a collision (see the cases at pp. 279 and 296). On the question of remoteness of damage the conclusion is negative, "few legal systems seem to have committed themselves irrevocably to any tests of remoteness," p. 63. Has the last word been said on this matter in the English Law of Tort?

These few scattered observations should indicate both the scholastic and the practical aspects of this extended survey of negligence: the book is essentially an example of what Professors David and Gutteridge regard as one of the great functions of comparative law—it is an exercise in comparative method. Not only are we given a first-rate account of the present-day organization of the French Courts (p. 230-235), of French legal theory ("doctrine") and case law ("jurisprudence"), but we are also given actual examples of their practical working—an excellent training for the serious student. The texts of the codes are well selected: the Latin, Italian, Spanish and German ones are translated; the French texts and cases are left in French only; the Russian is in English only; a reasonable compromise in these days of paper shortage. The reader of this book will certainly put it down a wiser and better prepared man; we commend it to the general reader as well as to the specialist in comparative law and in the conflict of laws. In these days of internationally unified laws of transport, and even of projects for the unification of matters like international sales of merchandise, no lawyer can afford to neglect such a scholarly introduction to the working and the vocabulary of other great systems of law. This book will help any serious student; it is, however, too learned for beginners in the law; the style of Professor Lawson's own comments and of his translations is excellent.

B. A. Wortley.

VOTING AND THE HANDLING OF DISPUTES IN THE SECURITY COUNCIL[1]

In a work of rather less than 200 pages Señor Jimenez de Arechaga, some time member of the Department of Security Council Affairs of the United Nations Secretariat, combines a practical knowledge of the procedures and practice of the Security Council with a legal analysis of those provisions of the Charter relevant to his subject. He shows that, in the five years of its existence, the Council has developed a body of precedent, certain forms of practice, and a set of techniques and customs which are surprisingly consistent and reveal a tendency towards a consciousness of its corporate personality hindered only by the obstructionist attitude of one of its permanent members.

Whilst we should agree with the author that the practice of abstention is not incompatible with the adoption of a non-procedural decision, it is more difficult to extend this concept of "tacit affirmation" to the position resulting from the absence of a permanent member; and the parallel between the two, drawn by the author, does not seem to us to be exact. Moreover, in so far as the adoption of a non-procedural decision in these circumstances is justified on the ground that a permanent member by absenting itself is guilty of a breach of its obligations under Article 28, we can only recall the opinion of the International Court of Justice on the Interpretation of the Peace Treaties, 1950, p. 228, " . . . it is clear that refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties . . ." It is submitted that the basis of *et tu quoque* is inadequate for resolutions of such moment.

After a detailed examination of the practice of the Council in relation to Article 27 (3) and in particular the proviso for abstention by a party to a dispute, a con-

[1] By Eduardo Jiménez de Arechaga. (N.Y.: Carnegie Endowment for International Peace, 1951.) Pp. 189

vincing argument is adduced against a too restrictive interpretation of what constitutes a "dispute" and for an extension of this proviso. It is suggested that, in practice, the interpretation might be made by that same technical procedure which purports to avoid the use of the "double veto" in qualifying a matter as procedural or non-procedural under Article 27. Firstly, after an objection has been made to the character of a certain resolution or the qualification of a set of circumstances as a dispute, a vote is taken to determine its nature. The President then draws his conclusions from the voting in the form of a ruling which stands unless overruled. Finally, should the ruling itself be challenged, this motion for its rejection fails unless it obtains the affirmative vote of seven members. The whole question of the legal effect of the statement of the Four Sponsoring Powers at San Francisco is dealt with lucidly and is lacking only in a fuller appreciation of the political implications of this agreement.

Three chapters are given to an examination of the powers and functions of the Council in relation to the pacific settlement of disputes, one dealing exclusively with Article 34 and the power of investigation. Chapter VI of the Charter has, perhaps more than any other, presented the lawyer with problems of interpretation and this work renders valuable service in affording illustrations of how the articles have been given practical application in the Council and supplemented by more informal procedures which add a sense of cohesion to a somewhat "piecemeal" chapter of the Charter. Some indication of the difficulties of reconciling the procedures under Article 33 and those contemplated in Article 52 dealing with regional arrangements, might not have been out of place.

A chapter on "Measures to Avert or End Hostilities" points to the necessity of isolating those circumstances which immediately threaten the peace from the intrinsic merits of the case, and the dual function of the Council involved in the general process of settlement—that of "policeman" and that of "arbitrator." It is unfortunate that the author was, owing to the date of publication, unable to consider the effect of the Recommendation of the General Assembly on November 3, 1950, on the use of armed forces as agents for the United Nations in the suppression of breaches of the peace and acts of aggression. On page 35 we find the statement that:

> ". . . any one of the permanent members of the Council by exercizing its vote could arrest the movement of the United Nations' forces. There is, unfortunately, no way out of that. The only answer, and it is admittedly only a partial answer, is provided by Article 51."

However, this conclusion might still find some agreement and will at least find sympathy, for the author can scarcely be blamed for not having foreseen these recent developments. We are reminded again of the wisdom of caution rather than dogmatism in pronouncing on the limitations of this most dynamic instrument, the Charter.

Finally, we must congratulate Señor Jimenez on a provoking and eminently readable analysis of these formative years of the Security Council.

D. W. Bowett.

THE ORIGINS OF MUHAMMADAN JURISPRUDENCE[1]

Sixty years ago the Hungarian scholar Ignacz Goldziher, in a brilliant investigation which revolutionized Islamic studies in Europe, laid the axe to the root of the accepted doctrine of the origin of Muslim *hadith* or Tradition. His destructive criticism, however, left a vacuum, since there was nothing to put in its place but a number of general inferences. The challenge offered by this state of affairs was recognized by all students of Islamic law and institutions, but the problem seemed insoluble, in the absence of adequate early documentation. It is no exaggeration to say that for half-a-century the dominant need in Islamic studies has been to discover a reliable method of positive *hadith*-criticism, which would enable investigators to distinguish and to place the elements which went into the elaborate structure of Muslim Tradition.

It is this task which, in the field of legal traditions, Dr. Schacht has accomplished in this study of the origins of Muhammadan jurisprudence. What it has involved in the minute examination of the earliest works now available, in piecing together their hints, and in the genial capacity to reconstruct the situations implied

[1] By Joseph Schaht. (Oxford: at the Clarendon Press, 1950.) Pp. xii+348. 25s. net.

by them, needs no elaboration. His argument is inevitably difficult and tightly woven, and to follow it calls for a like close and unremitting attention, with constant reference back and forward. But what emerges is no theoretical reconstruction; on the contrary, the pattern of events is so consonant with the general development of the early Islamic society and so adequately documented that it will become the foundation of all future study of Islamic civilization and law, at least in the West.

Though the non-specialist runs some risk in attempting to sum up an argument so complex, it seems desirable to present the main outlines here. The classical theory of the Muhammadan jurists assumed that the foundations of Islamic Law were laid by the Koran, that the explicit and implicit rules contained in the Koran were interpreted and supplemented by traditions which related the *sunna* or "practice" of the Prophet and were authentically transmitted from the mouths of his associates, the "Companions," that any resulting disagreements or omissions were settled by consensus of the Muhammadan Community at large, represented by its scholars, and that new cases could be determined by analogical reasoning from established precedents. Dr. Schacht has demonstrated that this apparently simple and self-evident theory is a methodology which was reached only after a very different historical process. The real foundations of the Law were local custom (in a few specific cases, such as inheritance, modified by the explicit rules contained in the Koran), supplemented by the administrative regulations issued by the Caliphs during the first century after Muhammad. The task undertaken by the jurists of the second and third centuries was to test and to revise these materials in the spirit of Koranic ethics and doctrine, to elaborate for the support of their rules and maxims chains of authority traced back to Muhammad himself, and finally, by insisting on the overriding claims of these "traditions," to unify in large measure the divergent views of the older schools.

The first section of Dr. Schacht's book traces the origins of the ideas of consensus and analogical reasoning within the old and loose "schools" of Iraq, Syria and Medina, each with its own *sunna* and "living tradition." The second briefly describes the rise of the opposition school of "traditionists" in the second century and the growth and systemization of legal "traditions" ascribed to the Prophet. The third deals with the growth of legal doctrine and the conflicts within the several schools, and the fourth with the development of technical legal thought. The whole process is seen to culminate in the bold and systematic reasoning of al-Shafi'i at the end of the second century (he died in Egypt in A.D. 820), upon whose methodology and synthesis the later consolidation of Islamic Law was based.

It may be that individual details of Dr. Schacht's reasoning will be modified by future students as other early works of Islamic jurisprudence become available, but his main structure is not likely to be impugned on any but *a priori* grounds. Not the least remarkable proof of its insight into the process that it analyses is the way in which the early jurists, from being mere school labels, emerge as living and active personalities, shaping (even if unconsciously) the successive stages in its development with an increasing mastery of technical method and reasoning. In the last sentences of the book Dr. Schacht hints at the possibility of a parallel work on the early development of positive law in Islam. All students of law and of Islamic culture must earnestly hope that he will carry out this project.

H. A. R. Gibb.

IL COMMONWEALTH BRITANNICO[1]

In law, as in custom, fashions change. Twenty years ago much learned time and labour were devoted to the discussion of the law and practice governing commonwealth relations, or imperial constitutional law as it was called in those days. Today our attention is concentrated on the manner in which each particular dominion is attempting to solve the constitutional problems raised by the advent of the welfare state. It seems more important to know how the Canadian and Australian courts view the discretionary powers of public authorities than to be able to expound the position of a governor-general or describe the way in which a dominion becomes a party to an international treaty. In part this is due to the pressure of events, but in truth there was always more politics than law about these matters, and even the constitutional lawyer needs some settled doctrine if he is to make sense of what the politicians do. While this change of emphasis was welcome, it also meant that

[1] By G. Treves. (Milan, 1950.) Pp. 266. 800 lire.

there was a definite need for a brief scholarly survey of the legal structure of the commonwealth which would be as up-to-date as its publisher permitted. Signor Treves has provided a model of what such a work should be. Although he has all the literature, legal and political, at his command (as the admirable bibliographies show), details are used to illustrate principles and not to overwhelm the reader. The style is fresh and lucid even when he is dealing with familiar and intractable material. A work of this kind is of interest to many who are not lawyers and to many lawyers who may not read Italian. May one ask for an English edition?

R. F. V. H.

NATIONALITY OF MARRIED WOMEN[1]

Practitioners concerned with a problem in this difficult field of law may care to have their attention drawn to this publication.[1] Part I is "An analysis of conflicts of laws in this field of nationality of married women"; it also contains a brief review of the international conventions at present in force which deal with this subject. Part II presents extracts from the relevant laws of sixty countries. It is a useful comparative survey.

R. F. V. H.

CURRENT LEGAL PROBLEMS, VOLUME III, 1950[2]

This, the third, issue of an admirable annual series amply sustains the varied interest and critical value of its predecessors. The volume opens with Lord Normand's presidential address to the Bentham Club in which he treats of the Judicial Committee of the Privy Council in Retrospect and Prospect. He is constrained to admit that the glory of this great Imperial tribunal, which in its heyday exercised "a jurisdiction wider in the area over which it was exercised more varied in the population which it affected and in the laws which it administered than any that has ever been known" has in these latter days been sadly diminished. While the tendency to abolish Appeals to the Privy Council must be accepted as the inevitable consequence of the growth of the sentiment of independence among the nations of the Commonwealth, Lord Normand finds some consolation in the increasing volume of business from the Colonial Empire and especially from the African territories "which will produce in time a crop of appeals as well, we may hope, as more nutritious crops." But a note of subdued melancholy pervades the Address.

The fourteen lectures on Current Legal Problems which follow were delivered in the Faculty of Laws at University College, London, during the session of 1949-50, and well deserve a wider audience in this permanent form. They cover an extensive range of topics of concern to the lawyer of today. Not the least of their merits is the freshness and vigour which render them eminently readable.

Professor Keeton, one of the editors, leads off with a striking exposition of the Changing Conception of Trusteeship which has been brought about by the "inversion of social values" in an age "in which property is consistently under attack and in which the thriftiness and foresight of former generations is frequently denounced as anti-social." It is a disquieting commentary. The concluding lecture is by the other Editor who trenchantly deals with misconceptions about International Criminal Law. The intervening dozen papers treat of such diverse subjects as Anachronisms in Equity, the Changed Relation of Landlord and Tenant, in which modern Rents legislation receives well-merited castigation, the Evolution of the Law of Libel, Possession and Larceny, in which the metaphysical absurdities of this branch of the law are exposed, and Human Rights and the Colour Bar. The reasoned criticism in which these lectures abound is salutary, though scarcely cheering, and the growing divergence between law and justice which they often disclose is depressing. The great Chief Justice Coke, were he to read this book in the Elysian fields, might well hesitate to describe the law exemplified in modern legislation as the "perfection of reason."

The publishers provide on the cover an anthology of laudatory press notices of previous volumes of the series. The present volume will be received with no less gratitude and afford no less enlightening delectation to its readers. But will Lord Jowitt regard himself as complimented by the assimilation of the spelling of his name to that of the famous Master of Balliol?

M.

[1] U.N. Studies, No. 5. Report by Secretary-General of U.N.O. (N.Y. 1950: H.M.S.O.) 3s. 9d.

[2] Edited by G. W. Keeton and G. Schwarzenberger. (London: Stevens & Sons Ltd.) Pp. vii+305. 21s.

PRIVATE COMPANIES

One of the most remarkable developments of the present century in the field of commercial law has been the spread over the greater part of the world of companies having the same object and general character as the English private company. The first statute sanctioning the formation of such companies and creating a definite regime for them was the German Act of 1892, concerning companies with limited liability (*Gesellschaft mit beschränkter Haftung—G.m.b.H.* for short). In England the first comparable statute was the Companies Act, 1907, which, however, did little more than define more closely and specifically regulate a type of company which had long been known to business and the legal profession, the general law of companies having been liberal enough to allow them to grow within its fold. Apparently the law of the U.S.A. has remained very much in this state, with the perhaps significant difference that even the term "private company" is unknown. But the English private company has spread through the greater part of the Commonwealth and Empire, and the German G.m.b.H. has been copied, more or less closely, elsewhere. Obviously this type of business organization, which caters especially for relatively small undertakings intended to be carried on with limited liability, is of great practical importance in the modern world and forms an excellent subject for comparative study.

M. de Sola Cañizares' *magnum opus*,[1] of which the first volume appeared in 1950, is precisely such a comparative study published in Argentina and made from the standpoint of an Argentine commercial lawyer. Hence, after a historical introduction, he deals seriatim with the various detailed topics which arise under the Argentine statute No. 11.645—this volume goes little farther than the formation of private companies—first exhausting the Argentine law and then dealing with the topic comparatively.

The book is on the grand scale, and admirably produced. It is hard to believe that anyone who has to deal with this kind of company in Argentina, or indeed elsewhere in Latin America, will fail to find guidance here, or, what is more, a final answer to his problem. M. de Sola is eminently practical in his approach, though he does not neglect problems of legal personality which seem more appropriate to a civilian than to a common law treatment of the subject. Thus his book is one for both the comparative lawyer and for the practitioner who has to deal with foreign law. It is peculiarly valuable in that the literature of Latin-American law is not usually very accessible in this country, and any account which in effect brings together the laws of all the Latin-American republics therefore fulfils a real need. The comparative lawyer will be glad to find them related to both English and Continental Law. F. H. L.

PARLIAMENTARY SOVEREIGNTY AND THE ENTRENCHED SECTIONS OF THE SOUTH AFRICA ACT[2]

Although the English invented the doctrine of parliamentary sovereignty, and some have disparaged it on that ground alone, it has been less often noticed that even those commonly regarded as the high priests of the mystery were subject to doubt. Flatly contradictory pages may be found in Coke and Blackstone; there are some curious passages in Austin on the law of God; and Dicey never succeeded in reconciling the doctrine with the concept of the rule of law, though he did what he could with Bryce's ingenious but unhappy notion of political sovereignty. Scepticism has increased in recent years. Some, like Mr. Richard O'Sullivan, have been so distressed by recent legislation that they have been tempted to deny the validity of the whole doctrine; others, like R. T. E. Latham, Sir Owen Dixon, Sir Ivor Jennings, and Mr. Sawer, by cautious and subtle examination of the concept from within its four corners, as it were, have revealed it to be at once more complex and less terrifying than had been thought. It appears that the lawyer can, without reservation or evasion, subscribe not only to the unlimited power of parliament but also to the possibility of legal restraints upon, at least, the mode of user of that power. So Anglican a solution is agreeable to many, and it has now been adopted by Mr. Cowen in his interesting and powerfully argued essay. As he says (p. 41), "the word sovereign is notoriously high-tensioned and charged with emotional

[1] *Tratado de Sociedades de Responsabilidad Limitada en Derecho Argentino y Comparado*, Vol. I. By F. de Sola Cañizares with the collaboration of E. Aztiria. (Buenos Aires: Tipografica Editora Argentina, 1950.) viii+717 pp.

[2] By D. V. Cowen. (Cape Town and Johannesburg: Juta & Co. Ltd., 1951.) Pp. 50 10s. 6d.

overtones," and his argument that the efficacy of the entrenched sections of the South Africa Act is not inconsistent with the full sovereignty of the Union parliament necessarily probes some very sensitive areas of the body politic. Mr. Cowen fully accepts the proposition that the Union parliament is a completely sovereign body, but he realizes that it leaves unanswered the question "what is the Union parliament?" His thesis is that the proviso to section 152 of the South Africa Act, 1909, which requires that legislation on the matters therein mentioned should be passed by both houses sitting unicamerally, imposes a restriction, not on the area of subject-matters over which the Union parliament possesses legislative power, but on the procedural manner and form which that parliament must observe in order to legislate on certain matters. There is a fundamental distinction between what may be done by an act of parliament and what the constituent elements of parliament must do in order to make an act of parliament. It should be noted that in South Africa this is not a question of the composition of parliament, as it might be elsewhere—for example, under section 128 of the Australian constitution—for section 152 of the South Africa Act does not provide for modifying the ordinary parliamentary composition by the insertion of a fourth element the electorate, but rather "provides the manner in which the three elements which are declared in section 19 of the South Africa Act to comprise the Union parliament shall combine for the purposes of legislation on matters within the entrenched sections" (p. 32). This approach means that it is improper to describe as *ultra vires* a measure passed in contravention of section 152, for that is an unsuitable term to denote the activities of a sovereign parliament: such a measure is simply not an act of parliament. Space does not permit further comment on the many interesting points raised, for Mr. Cowen's learning is deployed with vigour and ingenuity to meet attack from many directions; this reviewer can only say that he found the discussion of the effect of section 2 of the Statute of Westminster particularly interesting. This is a book which deserves careful study by all who are concerned with constitutional law.

R. F. V. Heuston.

REVISTA DE LA ESCUELA NACIONAL DE JURISPRUDENCIA[1]
BOLETIN DEL INSTITUTO DE DERECHO COMPARADO DE MEXICO[2]

The present reviewer has reviewed the two Mexican periodicals previously and had occasion repeatedly to point out that they maintained a level of which any legal periodical would have the best of reasons to be proud. During the year 1950, this tradition has been fully maintained. Among the contributions to the issue of the Revista de la Escuela Nacional de Jurisprudencia readers will presumably be particularly attracted by Professor Cossio's report on the discussion between him and Kelsen on the occasion of Kelsen's visit to the Argentine. The discussion involved the fundaments of the pure theory of law and of the egological theory which has recently been presented to English readers in the Latin-American volume of the excellent series "Twentieth Century Legal Philosophy." The contributions to the Bulletin include an instructive article on precontractual liability by Dr. Gutierrez and a short but interesting study by Dr. Roberto Goldschmidt on the part of the lawyer in the task of Legislation.

E. J. Cohn.

REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO[3]

The present volume of this Review contains two contributions of particular interest to comparative lawyers: a Spanish version of Ernst Rabel's article on the comparative conflict of laws which has been published in the English language in 24 Indiana L.J. (1949) 353, and a "comparative study of the doctrine of juridical personality" by Mr. A. Ferrar, which, however, attaches too much importance to the antiquated doctrines of the pandectists and too little to the modern Central-European statutory law on partnerships which differs most markedly from French law and the Latin-American systems which appear to follow in the main the French model. Professor Helfield's critical appreciation of Harold Laski's book on the American Democracy charges the author with having failed to capture the essence of America owing to failure to integrate individual data and his economic prejudices.

E. J. Cohn.

[1] Vol. XII, No. 45, Jan.-Mar. 1950. Pp. 245. (Universidad Nacional Autonoma de Mexico.)

[2] Year III, No. 7, Jan.-Ap. 1950. Pp. 233. No. 8, May-Aug. 1950. Pp. 233. (Universidad Nacional Autonoma de Mexico.)

[3] Vol. XIX. 1949-50. Nos. 1-3. Pp. 226.

LAW OF PARENT AND CHILD[1]

Dr. Spiro has written the first full-length treatise on the law of parent and child in South Africa, and in doing so has met a long felt need. It is a work of more than local interest, for the author has incorporated a good deal of comparative material, chiefly German and Swiss, and has discussed questions of principle fairly broadly. On the other hand he has wisely restricted the scope of the work to the relations of parents and children and has not attempted to deal with such related topics as the contractual capacity of unassisted minors or the powers of guardians other than parents.

The book begins with a general introduction on the history and scope of the parental power, as it should now be termed. Some may quarrel with the author's view that neither the parental power nor any incident of it can be abandoned or waived (pp. 17 ff.). The Administration of Estates Act S.71 (b) contemplates by implication that when a father abandons his minor child the mother may nominate a tutor for him, so that the father presumably loses his overriding authority at least in this respect. Besides, it is possible that, short of abandonment, particular incidents may be waived, such as the *prima facie* right to decide on a child's religious education. This point was left open in *Dreyer* v. *Lyte-Mason* (1948 (2) SA 245 W). The excursus at p. 30 on the plan of the work might suitably come in future editions at the beginning.

Dr. Spiro deals next with the acquisition and incidents of parental power. It seems unfortunate to class all the powers of parents under the heading "representation." This term applies more aptly to acts done by the parent on the child's behalf than to acts done by the child which the parent confirms. Dr. Spiro does not admit a distinction between parental authority and the parents' capacity as natural guardians, yet there is respectable authority for the distinction. Van der Keessel (Thesis 103) says that a parent administers adventitious property as guardian not as parent. Most recently, van den Heever, J. A., in *Ex parte Oberholzer* (1951) (1) S.A. 557 A) speaks of the "tweeledige hoedanigheid" of parent and natural guardian. If this is so the distinction between adventitious and profectitious property retains some importance. The court is more ready to allow sale or resettlement or to vary investment in the case of profectitious property, as in *Ex parte Brink* (1948 (4) S.A. 273 O) and a father's rights in respect of adventitious property are no greater than those of any other guardian, as was said in *Ex parte Joubert* (1949 (2) S.A. 109 O). On the other hand, on p. 70 the author seems to place too heavy a burden on the parent when he says that "inasmuch as problems of liability for administration of the property of a minor child are concerned, there is no material difference between a natural guardian and a tutor." I do not know of any authority that a parent must display the care of a *bonus paterfamilias* in the administration of his child's property and the difference between parent and tutor may be justified on the ground that the courts' interference in family life should be held to a minimum.

Most of the recent decisions reflect the conflicting claims of state and family and changing conceptions of family life. The court, as upper guardian, has long had wide discretionary powers to safeguard the interests of children; the Children's Act 1937, s. 58, gave it the power to deprive a father of his "paternal" power and transfer it to the mother. But this is exceptional. While a marriage subsists, the court will not ordinarily deprive the father of the custody of the child unless serious harm is apprehended (*Calitz* v. *Calitz,* 1939 A.D.36). Once matrimonial proceedings are begun, still more, once the marriage is dissolved, the court assumes wider powers, though even so the rights of the parents are not wholly extinguished. Thus *Bloem* v. *Vucinovich* (1946 A.D. 501) decided that a father to whom custody had been given could not exclude the mother from the personal control of the minor child after his death. This decision appears to reduce the rights of a testamentary tutor in such a case to a shadow, so far as "care of a person" of the child is concerned. But it is undesirable that a child should be subject to competing authorities and some may think it a pity that the Appellate Division did not decide cleanly in favour of one or the other. On the whole the courts now exercise an immense discretionary jurisdiction "in the interests of the child" with fairness and discretion. The prevalence of divorce, with its problems of custody and maintenance, has complicated their work beyond what the Roman and Roman-Dutch lawyers could foresee. As to custody, the paramount need is that the child

[1] By Erwin Spiro. (Cape Town: Juta & Co. Ltd., 1950.) Pp. xxxii+357. 62s. 3d.

should know where he stands, and hence the view taken in *Dreyer* v, *Lyte-Mason* that the custodian spouse has *prima facie* the right to decide the child's religious education seems preferable to the view of Dr. Spiro (p. 223). Again, it is hardly credible that a mother to whom custody has been awarded has no power to administer a child's property or to confirm his contracts (p. 220) though the A.D. left the question open in *Calitz* v. *Calitz*.

Dr. Spiro's book ends with useful sections on the conflict of laws and on jurisdiction. His work will be welcomed by a wide circle of lawyers for its accuracy and erudition. The author may envy the Romans their "inimitable art to say things crisply;" it is not altogether his fault that the book contains some awkward expressions which might be altered in a second edition.

A. M. HONORE.

DOMAINE PUBLIC ET RES EXTRA COMMERCIUM[1]

THIS is the French version of a book published by Professor Vegting in Dutch in 1946. It is a comparative study of the Roman, French and Dutch law relating to public property, and at the same time deals with the historical development of the doctrine of public domain which has been incorporated in the codes of both France and the Netherlands. There are two main themes of Professor Vegting's work. The first is that Roman law recognised that the State owned *res publicae* including *res publico usui destinatae*. This is supported by a study of the texts of Roman private law and the views of commentators, particularly pandectists. The state's ownership was private law ownership, similar to that of natural persons. Further, the glossators and humanists on the whole recognized these truths. The second related theme is that the French and Dutch codes do not create a relation between the state and the public domain radically different from that between private persons and private property. In particular, the views of Proudhon are historically unsound, for he considered the public as the holder of the right to the public domain, in the sense of *res publico usui destinatae,* and denied that the state was owner. Professor Vegting will not admit a distinction between private and public ownership, because he starts from the point of view (p. 255-256) that private law is the common law and that administrative law merely creates certain exceptions on points of detail. To some extent this corresponds with the Anglo-Saxon view. But whereas in English law both state, local authority and public are having regarded as private law rights over public property, so that the right e.g. to pass along the highway is secured by the private law action of nuisance, Professor Vegting will not allow the public any rights at all. He approves the opinion of Bartolus that a public right of way *"non est ius sed quaedam facultas."* Again he insists that the state or commune can withdraw property dedicated to the public use at its discretion and is not subject to judicial control in doing so (pp. 261-262).

Enough has been said to show that Professor Vegting is pleading not for the rule of (private) law but for an authoritarian view of the state.

The book is well printed and the argument clearly set out. A great deal of research has clearly gone to the making of it. It would, perhaps, have helped the reader to indicate by a change of type when the text changes from French to some other language.

As to the main themes, it is easier to deal first with the historical argument, which appears to me misconceived. It is no doubt true that the texts of Roman private law are consistent with the view, which they certainly do not prove, that the state in some sense owned *res publicae* such as public buildings and even things such as harbours and roads which were dedicated to the public use, and that municipia likewise owned public buildings within their juridiction. It does not follow that state and municipal ownership was comparable with private ownership and there is a good deal of evidence that it was very different. Professor Vegting ignores the sharp distinction which the Romans drew between public and private law (see Schulz, Principles of Roman Law, Ch. III). Thus Ulpian in D. 43.8.2.2 (*loca enim publica utique privatorum usibus deserviunt iure scilicet civitatis, non quasi propria cuiusque*) clearly states that the use of public places by private individuals is a matter of public law and depends on citizenship. Writers on private law did not deal with public law except in passing, e.g. in commenting on those parts

[1] By W. G. Vegting. (Alphen aan den Rijn: N. Sansom N.V.; Paris: Recueil Sirey.)—Pp. xvi+293.

of the edict which give interdicts for the protection of public property. When they do touch on public law they are often unreliable. Thus Gaius 2.7.21, attributing the ownership of provincial soil to the Roman people or Cæsar, has been dismissed by A. H. M. Jones (31 J.R.S. 26) as a "conveyancer's phantasy." Professor Vegting does not appear to have consulted the historical and constitutional material. Mommsen's *Staatsrecht* does not appear in the bibliography nor does Hirschfeld's *Kaiserlichen Verwaltungsbeamten*. The development of the *fiscus* would seem very important for Professor Vegting's purpose, since it affords an example of private property which in the course of time came to be treated as public, or on the view of some (Last, 34 J.R.S. 51) of the opposite process. There is merely a passing reference on pp. 34-35.

It would need much research to settle all the problems involved but, putting it at its lowest, public law property rights seem to have differed considerably from those of private law. Thus positive servitudes could be imposed on land in public law, which is the basis of the system of *coloni adscripti*. As it stands, the author's historical argument is merely a textual exercise.

The second thesis is political rather than legal. Certain articles of the French and Dutch codes (Arts. 537-543 C.C.; art. 593 B.W.B.) appear to distinguish between things which do or can belong to private persons and things which do not admit of private property, notably those parts of the public domain, such as public roads and rivers, that are dedicated to the public use. Again Art. 1128 C.C. says that only things *"dans le commerce"* can be the object of contractual agreements. The author explains *res extra commercium* in both Roman and modern law as referring to things that could not be validly dealt with by private persons, since in view of the conflicting "faculties" (one must not say rights) of the public, effect could not be given to their contracts. This is unconvincing for Roman law, because a contract to alienate a *res aliena* was valid, and the exclusion of sales of *res extra commercium* is treated as an independent rule. The C.C. makes contracts for the sale or donation of a *res aliena* void (arts. 943,1599). It was therefore admittedly superfluous on Professor Vegting's view to enact art. 1128. It is much simpler to suppose that the Romans regarded *res extra commercium* as outside private law altogether and that Art. 1128 C.C., which must after all mean something, takes the same view.

Some of the arguments used in favour of "private" state ownership are purely conceptual. Thus, on p. 248-249 it is said to be a contradiction in terms to talk of "goods which cannot be the subject of private property" because the notion of a "good" is of something that can be appropriated. Yet on the same page the argument that the state is not owner of the public domain because it has no right of use and enjoyment is refuted by the correct observation that "the right of property has no fixed content." Stripped of quasi-logical arguments there remains the author's authoritarian view of the state in its relation to public property which appears to have been accepted by the Dutch courts, though not by the French. At the other extreme stands the socialist view propounded by Proudhon and his followers. Neither history nor logic determines the choice between them.

A. M. Honore.

The following publications have also been received:—

Boasson, C. H. *Sociological Aspects of Law and International Adjustment.* North Holland Publishing Co., Amsterdam. Pp. 118.

Bowen, C. G. Douglas. *South Australian Industrial Reports,* 1948. Vol. XXII. K. M. Stevenson, Government Printer, Pp. 474.

Canada. *Proceedings of the 32nd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation.* Pp. 103.

Canada. *Statutory Orders and Regulations Consolidation,* 1949. Vol. IV. S-Z.

Colston Research Society. *Colonial Administration.* Butterworth's Scientific Publications Ltd. Pp. 252.

Gregory, R. C. L. *County Court Manual.* H.M. Stationery Office. Pp. 128.

Hancock, W. K. *History of Our Times.* (Webb Memorial Lecture). London: Athlone Press University. 2s. 6d.

Higgins and Colombos. *International Law of the Sea.* Longman's. Pp. 655. 50s.

Institute of Criminology, University of Paris. *Révue de Science Criminelle et de Droit Pénal Comparé*. Pp. 718. 1,600 francs.

International Monetary Fund. *Annual Report*, 1950. Washington, U.S.A. Pp. 160.

Lawson, F. H. *Rational Strength of English Law*. London: Stevens and Sons Ltd. Pp. 147. 10s.

Lissitzyn, Oliver J. *International Court of Justice*. Carnegie Endowment. U.N. Studies, No. 6. Pp. 118.

Michigan University Law School. *Conflict of Laws and International Contracts*.

Miller, Cyril T. *Some questions of Maritime Law now before the Comité Maritime International*. Gothenberg University of Economics Publication 1951.

Neufeld, E. *The Hittite Laws*. London: Luzac and Co. Pp. L. 195. 35s.

Nigerian Debates. Fourth session. Vol. 1 and 2. Nigerian Government. 1s. 6d.

Nussbaum, I. *Money in the Law, National and International*. Brooklyn, Foundation Press. Pp. 600. $8.00.

O'Sullivan, Richard. *The Inheritance of the Common Law*. London: Stevens and Sons. Pp. viii, 118. 8s.

Schwarzenberger, G. *Power Politics*. London: Stevens and Sons. Pp. 816. £3 10s.

Smith, H. A. *Law and Custom of the Sea*. Second edition. London: Stevens and Sons. Pp. xii, 216. 12s. 6d.

Treaty Series. Vols. 50-60. (N.Y. U.N.)

Water Resources Law. *Report of the President's Water Resources Policy Commission*. Pp. 777. Vol. III, 1950.

ERRATA

Professor F. H. Lawson regrets that owing to circumstances over which Mr. K. E. Robinson had no control, certain misprints crept into his article in the last number on "The Public Law of Overseas France Since the War." The following corrections should be made:

P. 37 line 47, for "natural" read "national"; p. 38 note 7, for "Tome 53" read "Tome 53 I"; p. 39 line 5, for "idigenous" read "indigenous"; p. 40, "In all four of the topics selected" should begin a new paragraph; p. 42 note 17, for "ordnance" read "ordonnance"; p. 44 line 11 for "Unitary State" read "unitary state"; p. 44 line 19, for "Sengalese" read "Senegalese"; p. 44 last line, "Colonisation" should not be in italics; p. 45 line 32, for "Investissement" read "investissement"; p. 45 line 33, "the" should be inserted before "post-war settlement"; p. 46 line 33, for "French union" read "French Union"; p. 49 line 49, for "Parliament" read "Parlement"; p. 50, "The 'Régime Législatif' since 1946" should be in black type on a separate line; p. 52 line 16, "le" should be within the quotes; p. 52 line 37, for "Article of the Constitution" read "Article 77"; p. 53 line 2, for "the law March 19, 1946" read "the law of March 19, 1946"; p. 54 line 44, for "college" read *collège"*; p. 54 line 45 for "citoyens de" read *"citoyens de"*; p. 55 line 22, for (*or citoyens de statut français*) read (of *citoyens de statut français*); p. 56 line 27, for "Constitutional" read "constitutional"; p. 44 footnote 26 should read "vide supra p. 42"; p. 46 footnote 30 should read "vide supra p. 43"; p. 47 footnote 34 should read "v. infra p. 48"; p. 50 footnote 46 should read "v. infra p. 54"; p. 51 footnote 52 should read "v. infra p. 55"; p. 54 footnote 63 should read "v. supra p. 47."

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